CHAPTER 10

Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination

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1 Introduction

The Maastricht Treaty in 1992 marked "a new stage in the process of creating an ever closer union among the peoples of Europe".[1] Before 1992, European integration was built upon economic premises, which translated into the four fundamental freedoms of goods, persons, services and capital.[2] Rights that were given to individuals were aimed at realizing the economic goals that were part of the EEC's design.[3] The right to family reunification for workers, for instance, was granted to facilitate their integration into the host

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1 Art. A of the 1992 Treaty on European Union (Maastricht Treaty). It is debated whether the Maastricht promise has realized its full potential. See e.g. Kochenov, D., and Plender, R. (2012). EU Citizenship: From an Incipient Form to an Incipient Substance? *European Law Review* 37, pp. 369–396.

2 Now Arts 30, 34, 45, 49, 56 and 63 TFEU. Barnard, C. (2013). *The Substantive Law of the EU: The Four Freedoms.* Oxford: Oxford University Press. Despite its economic premises, the European Economic Community (EEC) was a political project that was meant to further peace and welfare after the Second World War. An economic approach was chosen, however, because political integration was not feasible, and the original plan to establish a European Political Community and/or a European Defence Community was rejected by the French Parliament. Koopmans, R., and Statham, P., eds. (2010). *The Making of a European Public Sphere: Media Discourse and Political Contention*. Cambridge: Cambridge University Press, p. 16 *et seq*.

3 First the EEC, later the Economic Community (EC), and now the European Union. Tryfonidou, A. (2009). *Reverse Discrimination in EC Law.* Alphen aan den Rijn: Kluwer Law International, p. 5 *et seq*.; Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law: A Comparative Institutional Analysis.* London: Bloomsbury Publishing, p. 4.

Member State and to further the economic purpose of their movement.[4] Therefore, it was only available to those who move to or reside in a Member State of which they are not a national.[5] The Maastricht Treaty broadened the sphere of European cooperation by establishing the EU, and introduced EU citizenship.[6]

This contribution departs from the premise that one of the qualities that citizenship confers is equality before the law.[7] It is shown, however, that equality before the law collides with another constitutional principle of EU law. The principle of conferral implies that some competences are conferred to the EU and others are retained by the Member States.[8] As a result, the legal position of citizens differs, depending on whether they are subject to national or European rules. This differentiation may cause inequality.[9]

Because of its unique position at the intersection of free movement, immigration policy, fundamental rights, limited Union competence, and political controversy, familly reunification is one of the areas in which differentation between citizens occurs on the basis of whether they are a subject to EU law or

4 Berneri, C. (2017). *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens.* London: Bloomsbury Publishing, p. 8; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law.* Cambridge: Intersentia, p. 30.

5 Now: Art. 3 of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123.

6 Among other institutional changes, such as the introduction of new policy areas by the Maastricht Treaty.

7 Kochenov, D. (2010). Citizenship Without Respect: The EU's Troubled Equality Ideal. *Jean Monnet Working Paper* No. 8, p. 12 *et seq.*; Kochenov, D. (2017). On Tiles and Pillars: EU Citizenship as a Federal Denominator. In: Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press, pp. 5, 9; De Búrca, G. (1997). The Role of Equality in European Community Law. In: Dashwood and O'Leary, eds., *The Principle of Equal Treatment in EC Law.* London: Sweet & Maxwell, p. 16; Marshall, T.H. (1992). *Citizenship and Social Class*. London: Pluto Press.

8 Art. 4, para. 1, and Art. 5, paras 1–2, TEU and Arts 2–6 TFEU.

9 Garben, S., and Govaere, I. (2017). The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future. In: Garben and Govaere, eds., *The Division of Competences Between the EU and the Member States Reflections on the Past, the Present and the Future.* Oxford: Hart, p. 3 *et seq.*; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 6; Also see the contribution of H.U. Jessurun D'Oliveira in this volume on the current division of competences between EU law and national law in citizenship matters.

not.[10] Family reunification in the EU is defined as the situation in which a third-country national family member of a resident of one of the Member States acquires a residence title to reside with the family member who is already legally in the EU.[11] The family member in the EU can either be a third-country national or an EU citizen. This contribution only examines family reunification between third-country nationals and EU citizens. The legal regime for family reunification between third-country nationals who are legally residing in the EU and their third-country national family members is not discussed.[12]

Directive 2004/38 regulates the right of EU citizens and their family members to move and reside freely within the territory of the Member States. EU citizens who move to or reside in a Member State of which they are not a national benefit from its protection, which includes the possibility for family reunification under very lenient conditions.[13] Family reunification between third-country nationals and EU citizens who do not move to or reside in a Member State of which they are not a national is regulated by the Member State of which the EU citizens is a national. Some Member States impose requirements for family reunification for their own nationals that are far stricter than the requirements EU law imposes on EU citizens who exercise their free movements rights.[14] This phenomenon is called reverse discrimination.[15]

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10 Faull, J. (2011). Prohibition of Abuse of Law: A New General Principle of EU Law. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law. A New General Principle of EU Law?* Oxford: Hart, p. 291 *et seq*., especially p. 293.

11 The term "third-country national" refers to anyone who does not have the nationality of one of the Member States.

12 Third-country national residents in the EU can rely on Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification, *OJ L 251*, 3.10.2003, p. 12–18.

13 When an EU citizen resides in a Member State in compliance with Directive 2004/38, his family members can join him without the need to fulfill any conditions, except for the obligation to have health insurance. See Art. 7 of Directive 2004/38, cit.

14 See Neergaard, U., Jacqueson, C., and Holst-Christensen, N., eds. (2014). *Union Citizenship: Development Impact and Challenges. The XXVI FIDE Congress in Copenhagen.* Copenhagen: DJØF Publishing, available at fide2014.eu; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 120 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union: A Recurring Balancing Act.* Cambridge: Intersentia, p. 4 *et seq*., 39 *et seq*.; Berneri, C. (2017). *Family Reunification in the EU*, cit., p. 7.

15 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 13 *et seq*., p. 117 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 3 *et seq*.; Davies, G. (2003). *Nationality Discrimination in the European Internal Market.* Alphen aan den Rijn: Kluwer Law International; Poiares Maduro, M. (2000). The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination. In: Kilpatrick, Novitz, and Skidmore, eds., *The Future of European Remedies.* London: Bloomsbury Publishing; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention: EU

When a national of a Member State cannot comply with the strict conditions for family reunification in national law, EU law allows to benefit from more lenient rules by moving to another Member State, after which EU law is applicable. Case-law of the Court of Justice provides that upon return to the home Member State of the EU citizen (in a return situation), his family members retain their residence rights. The only condition to retain these rights is that residence in the host Member State must have been genuine. If that is the case, the family continues to fall within the scope of EU law and does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[16] If the conditions are fulfilled, this

Citizenship and Family Reunification Rights. *European Journal of Migration and Law* 13 (4), pp. 443–466; Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe. *Legal Issues of Economic Integration* 35 (1), pp. 43–67; Hanf, D. (2011). Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice? *Maastricht Journal of European and Comparative Law* 18 (1–2), pp. 29–61; Oosterom-Staples, H. (2012). To What Extent Has Reverse Discrimination Been Reversed? *European Journal of Migration and Law* 14 (2), pp. 151–172; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin. In: Guild, Rotaeche, and Kostakopoulou, eds., *The Reconceptualization of European Union Citizenship.* Leiden/Boston: Martinus Nijhoff Publishers; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law. *Irish Jurist* 44, pp. 13–46; Spaventa, E. (2009). Seeing the Wood Despite the Trees, On the Scope of Union Citizenship and Its Constitutional Effects. *Common Market Law Review* 45(1), pp. 13–45; Costello, C. (2011). Citizenship of the Union: Above Abuse? In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. 321 *et seq*.

16 Court of Justice, judgment of 7 July 1992, case C-370/90, *Singh*; judgment of 23 September 2003, case C-109/01, *Akrich*; judgment of 11 December 2007, case C-291/05, *Eind*; judgment of 25 July 2008, case C-127/08, *Metock and Others*; judgment of 12 March 2014, case C-456/12, *O. and B.*, paras. 51–61; judgment of 5 June 2018, case C-673/16, *Coman and Others*, paras. 24, 40, 51–53; judgment of 27 June 2018, case C-230/17, *Altiner and Ravn*; judgment of 12 July 2018, case C-89/17, *Banger*; Watson, P. (1993). Free Movement of Workers – A One Way Ticket? Case C-370/90 *The Queen v. Immigation Appeal Tribunal and Surinder Singh*. *Industrial Law Journal* 22 (1), pp. 68–77; Bierbach, J. (2008). European Citizens' Third-Country Family Members and Community Law: Grand Chamber decision of 11 December 2007, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind* – The return of the member state national and the destiny of the European citizen. *European Constitutional Law Review* 4 (2), pp. 344–362.; Costello, C. (2009). *Metock*: Free Movement and "Normal Family Life" in the Union. *Common Market Law Review* 46 (2), pp. 587–622; Cambien, N. (2009). Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform. *Columbia Journal of European Law* 15 (2), pp. 321–342; Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers: *O and B*, and *S and G*. *Common Market Law Review* 52 (3), pp. 753–777; Van Eijken, H. (2014). De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten. *Nederlands Tijdschrift voor Europees Recht* 10, pp. 319–324.

construction makes it possible to circumvent the national family reunification rules by temporarily moving to another Member State and then come back, which exempts the family from the applicability of national law.

Circumventing national legislation on family reunification by acquiring residence rights in another Member State and then return with them without intervention of national law[17] is called the "Europe-route".[18] The availability of the Europe-route empowers EU citizens to change the legal regime that applies to them and thereby partly remedies the inequality that exists between EU citizens that benefit from EU law and those who do not. Thereby it could offer a form of reconciliation for reverse discrimination. At the same time, however, the availability of the Europe-route curtails the competence of the Member States to regulate the position of their own nationals.[19] To prevent express circumvention of applicable national immigration law through use of the Europe-route, art. 35 of Directive 2004/38 gives Member States the possibility to classify the use of EU rights as abuse of law and refuse or withdraw the residence rights EU citizens' family members derive thereof.[20] The legitimate

17 Faull, J. (2011). Prohibition of Abuse of Law, cit., p. 291 *et seq*., especially p. 293; COSTELLO, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin, cit., p. 169 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*. Circumvention of EU law may also be relevant when national law does not allow for gay marriage. In *Coman and Others*, cit., the Court decided that gay marriage and the pertaining rights that are obtained in another Member State can also be brought back to the home Member State, thereby evading the impossibility of gay marriage that exists in some Member States. See: Tryfonidou, A. (2018). Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment. *European Law Blog*, available at europeanlawblog.eu; Kroeze, H.H.C., and Safradin, B. (2019). Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest. *Nederlands Tijdschrift voor Europees Recht* 1–2, pp. 51–59. A precondition that is set to bring rights back home is that residence in the host Member State has been genuine. See *O. and B.* cit., paras. 51–61 and *Coman and Others*, cit., paras. 24, 40, 51–53.

18 Member States did not receive this decrease in their competence with open arms, and a discourse arose about "closing the Europe-route". In this discourse it is suggested that (purposeful) circumvention of national family reunification rules by temporarily moving to another Member States to fall within the application of the more lenient EU law on family reunification should be a ground to refuse the rights that are pursued. Most notably in the Netherlands. See Parliamentary Document 29 700, Amendment of the Immigration Law 2000 with regard to the integration requirement, no. 31: Letter from the Minister for Immigration and Integration to the Parliament, zoek.officielebekendmakingen.nl. Also see: Costello, C. (2009). Metock, cit., p. 587 *et seq*.

19 And it makes less favorable treatment of nationals who cannot bring themselves within the scope of EU law even more pronounced. See the argument below.

20 *Singh*, cit., para. 24, see infra; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive: A Commentary*. Oxford: Oxford University Press, p. 296 *et seq*.

concern of Member States to avoid circumvention of their national laws can be contrasted with the individual's wish to live together with his family, which is protected by human rights law. The European Convention of Human Rights protects the right to family life and the right to marry. These rights are not absolute and do not impose "a general obligation [...] to respect the choice by married couples of the country of their matrimonial residence or to authorise family reunification on its territory".[21] Yet, since the beginning of the 21st century, the European Court of Human Rights demonstrated a "readiness to extend the protective reach of Article 8 [of the European Convention on Human Rights (ECHR)] in the field of immigration".[22] In light of the protection of the family, it is uncomfortable in itself that the EU legal system is so fragmented that EU citizens are in need of circumventing their national laws to be together with their loved ones in the first place.[23] A tension exists between the citizen's right to love,[24] and the Member State's "right to control the entry of non-nationals into its territory", which limits the possibilities the circumvent their national law.[25] To protect the Member States' discretion in defining and maintaining

21 European Court of Human Rights, judgment of 28 May 1985, nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 68; judgment of 31 January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107.

22 THYM, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? *International & Comparative Law Quarterly* 57 (1), pp. 87–112, 111; e.g. European Court of Human Rights, judgment of 21 December 2001, no. 31465/96, *Sen v. the Netherlands*; judgment of 1 December 2005, no. 60665/00, *Tuquabo-Tekle et al v. the Netherlands*.

23 Much can be said about this perspective. One insight is that EU law is an institute of exclusion, be-ause it only privileges the "good citizens" who add to the establishment of the internal market. Kochenov, D. (2017). On Tiles and Pillars, cit., pp. 59–62; Azoulai, L. (2017). Transfiguring European Citizenship: From Member State Territory to Union Territory. In: Kochenov, ed., *EU Citizenship and Federalism*, cit.; Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship Through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 220 *et seq.*; O'Brien, C. (2017). *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK.* London: Bloomsbury Publishing. Also see: Iglesias Sánchez, S. (2017). A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement. In: Kochenov, ed., *EU Citizenship and Federalism*, cit.

24 D'Aoust, A.M. (2014). Love as Project of (Im)Mobility: Love, Sovereignty and Governmentality in Marriage Migration Management Practices. *Global Society* 28 (3), pp. 317–335; Karst, K.L. (1980). The Freedom of Intimate Association. *The Yale Law Journal* 89 (4), pp. 624–692.

25 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

their national policy choices, they can us the concept of abuse of rights[26] to limit the circumvention of national law. Abuse of law is defined as a situation in which the conditions to acquire a right are formally fulfilled, whereas the conduct that led to conferral of the right does not meet the purpose for which the right was conferred.[27] Since abuse of law is characterized by the fact that the conditions to acquire a right are formally fulfilled, limiting those rights on the ground of that abuse may be contrary to the principle of legal certainty.[28] In the interest of legal certainty, and in the interest of the individual's right to love and live with his family, it is therefore necessary to carefully delineate the scope of application of abuse of law in the context of EU family reunification, which is the main purpose of this contribution. By determining the width of the scope of EU law, the remaining discretionary competence that is left to the Member States also becomes clearer.[29] When abuse of law is given a broad interpretation, Member States can more easily rely on it and have more leeway in enforcing their national rules at the expense of limiting the rights that derive from EU law. Conversely, when abuse of law is given a narrow interpretation, it is more difficult for Member States to rely on it and is more difficult to take away EU rights. A broad interpretation of abuse of law thus favours Member States' interests in protecting their competence to regulate the legal position of their nationals, and a narrow interpretation favours the effectiveness of EU law, and the individual's right to love and live with his family.

This research addresses abuse of EU law in the context of family reunification between a third-country national and an EU citizen to acquire a residence right. The main research question is how genuine use of EU law for the purpose of family reunification, and abuse of EU law that is used to circumvent national immigration law can be distinguished. Two types of possible abuse are considered, the conclusion of marriages of convenience and the circumvention of national law through use of the Europe-route. Both types of conduct are aimed at bringing a case of immigration or family reunification within the scope of EU law to benefit from a more lenient immigration/family reunification regime. Social welfare tourism as a form of abuse of free movement law is excluded from the analysis, with the exception of those cases that are

26 Abuse of law and abuse of rights are used interchangeable in this contribution.

27 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. 296. See infra.

28 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*., especially p. 296; Poiares Maduro, M. (2011). Foreword. In: De La Feria, and Vogenauer, eds., *Prohibition of Abuse of Law.* cit., p. vii.

29 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 7.

conducive to understanding the concept of abuse of law in the context of family reunification.[30] Art. 35 of Directive 2004/38 also mentions fraud a a reason to refuse, terminate or withdraw rights. Fraud "may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence".[31] Abuse of law, on the other hand, refers to "an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules".[32] Therefore, the difference between fraud and abuse is that in case of abuse, the conditions for acquiring a right are fulfilled, whilst in the case of fraud, information is falsified to make it seem like they are fulfilled when they are not. This contribution only deals with abuse of law and not with fraud.

The second chapter of the contribution will introduce the legal and political context in which reverse discrimination and (ab)use of rights for the purpose of family reunification are positioned. Particular attention will be given to the federalist-citizenship contraposition that is apparent in the EU constitutional struggle and mitigated by the introduction of the concept of abuse of law. This part will also explore the role of the ECHR as a complementary source of protection when situations fall outside the scope of EU law. The third chapter of this contribution addresses the Member States' concern about circumvention of their national immigration laws. To deal with this circumvention, they may classify the use of free movement rights as abuse of EU law and refuse or withdraw residence rights that are derived thereof. Doing so, however, may compromise legal certainty. Chapters four until seven apply the concept of abuse in a family reunification context, and aims to delineate te scope of abuse in

30 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*., especially p. 300 *et seq*.; Mantu, S.A., and Minderhoud, P.E. (2016). Exploring the Limits of Social Solidarity. Welfare Tourism and EU Citizenship. *UNIO – EU Law Journal* 2 (2), pp. 4–19.

31 Communication COM(2009) 313 final of 2 July 2009 from the Commission on the application of Directive 2004/38, p. 15, point 4.1.1; Court of Justice, judgment of 5 June 1997, case C-285/95, *Kol v. Land Berlin*, para. 29; judgment of 27 September 2001, case C-63/99, *Gloszczuk*, para. 75; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*. especially p. 296.

32 Communication COM(2009) 313, cit., p. 15, point 4.1.2; Court of Justice, judgment of 14 December 2000, case C-110/99, *Emsland-Stärke*, para. 52 *et seq*.; judgment of 9 March 1999, case C-212/97, *Centros*, para. 25.

this area of the law. The seventh chapter elaborates on the question when residence in another Member State is sufficiently genuine to retain family members' residence rights upon return to the home Member State of the EU citizen. It is demonstrated that the creation and strengthening of family life is the central criterion that needs to be taken into account. The eighth section evaluates these conditions and further elaborates upon the distinction between abuse of law and noncompliance with the applicable conditions for family reunification. The nineth and last section, finally, discusses the most recent case-law of the Court which deals with the personal scope of family reunification under EU free movement law in return situations, and in general. The importance of the research is to add to the understanding of abuse of law in a family reunification context and to inquire about its implications for legal certainty and judicial protection in the EU. In addition, the research aims to position the theme of reverse discrimination in a broader constitutional context. Last but not least, the contribution sheds light on the complexities of the return situation and further discusses under which circumstances a residence right can be derived after the exercise of free movement rights upon return in the home Member State of the EU citizen.

II Reverse Discrimination: Colliding Constitutional Principles in EU Law

It can be deduced from the text of the Treaties,[33] and many sources of secondary law, that European law-makers in the past and in the present have attached great importance to equality in EU law.[34] In fact, it is considered to be "one of the fundamental values people throughout Europe can agree upon" as a result of a "longstanding tradition of egalitarian discourse [...] on the old continent".[35] "As a consequence, European equality law opens up a space in which European citizens feel included in the broader integration project".[36] Citizenship as the manifestation of equality may, however, collide with other constitutional principles of the EU, which as an international organization goes further than merely intergovernmental cooperation and very much resembles a federalist

33 E.g. Art. 2 TEU; Art. 18 TFEU; Title III on Equality, Charter of Fundamental Rights of the European Union (Charter).

34 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 1 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 162–166.

35 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 3.

36 Ibid., p. 1 *et seq*. (citations on p. 3).

entity.[37] Upholding the federal balance requires a compromise between the need of the EU to have sufficient competences to achieve the common goals for which it was established, and preserving the sovereignty of its Member States.[38] The competences of the EU are, therefore, limited by the principle of conferral, which is translated into the division of competences.[39] Through this principle, the EU is shaped into a type of multi-level governance system, which pursues an optimal allocation of regulatory competences. Allocation of these competences is directed by the principle of subsidiarity, which means that competences are exercised at the level of government that is best positioned to regulate a specific issue. The EU may only intervene if it is able to act more effectively than the Member States at their respective national or local levels.[40]

Contrary to the notion of equal citizenship, the division of competences implies the possibility of unequal treatment among citizens, because the rules that are applicable to an individual may vary according to the level of governance where the competence to regulate the situation rests. The attachment of European decision-makers to equality does not preclude differentiation, since "the simple fact that we may agree that equality takes up a prominent place in European law tells us little about its functioning or how we should evaluate its application".[41] Its functioning seems to be limited to the protection of equality within a legal regime – either in the EU or in a Member State – without real consideration for the differences that exist between these legal regimes. Thus, a tension exists between equal citizenship and the division of competences. In the EU this tension is particularly noticeable when EU citizens who reside in their own Member State and do not fall within the scope of EU law enjoy less protection than those who reside in a Member State of which they are not a

37 Kochenov, D. (2017). On Tiles and Pillars, cit., p. 1 *et seq*., especially pp. 16–35; Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 147 *et seq*., especially p. 148; Zweifel, T.D. (2002). *Democratic Deficit? Institutions and Regulation in the European Union, Switzerland, and the United States in Comparative Perspective.* Oxford: Lexington Books; Menon, A., and Schain, M. (2006). *Comparative Federalism: The European Union and the United States in Comparative Perspective.* Oxford: Oxford University Press; Lenaerts, K. (1997). Federalism: Essential Concepts in Evolution. *Fordham International Law Journal* 21 (3), pp. 746–798.

38 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship, cit., p. 147 *et seq*., especially p. 149; Lenaerts, K. (1997). Federalism, cit., p. 746 *et seq*., 775.

39 Arts 4, para. 1, and 5, paras. 1–2, TEU, Arts 2–6 TFEU.

40 Art. 5, para. 3, TEU; Protocol no. 2 on the application of the principles of subsidiarity and proportionality; SCHÜTZE, R. (2009). Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism? *The Cambridge Law Journal* 68 (3), pp. 525–536.

41 Croon-Gestefeld, J. (2017). *Reconceptualising European Equality Law*, cit., p. 2.

national. The occurrence of this inequality causes the reverse discrimination, which was mentioned in the introduction.[42] "Reverse" means that the group that is being discriminated against is an unexpected group, which is treated less favourably in comparison with another group which normally would receive the inferior treatment.[43] More specifically, it is normally expected that "insiders" enjoy more privileges than "outsiders", but when citizens are reversely discriminated, the opposite situation exists.[44]

Reverse discrimination occurs

> due to the fact that, in order to further the Community's central aim of establishing a common market, [EU] law […] grants rights to [persons] that fall within its scope by virtue of their contribution to the construction of the internal market, that are more generous or flexible than those that are provided by national laws to persons […] that are deemed to fall within the scope of application of national law, as a result of the application of the purely internal rule. […] Accordingly, there may be a difference in treatment.[45]

In other words, because the EU originated from an economic rationale, the Union's competence only extends to the legal position of EU citizens who move between Member States, because they contribute to the establishment of the internal market.[46] Purely internal situations, which are confined in all

42 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 13–18; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 3–10; Davies, G. (2003). *Nationality Discrimination in the European Internal Market*, cit.; Poiares Maduro, M. (2000). The Scope of European Remedies, cit.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention, cit.; Tryfonidou, A. (2008). Reverse Discrimination in Purely Internal Situations, cit.; Hanf, D. (2011). Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?, cit.; Oosterom-Staples, H. (2012). To What Extent Has Reverse Discrimination Been Reversed?, cit.; Groenendijk, K. (2014). Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin, cit.; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit.; Spaventa, E. (2009). Seeing the Wood Despite the Trees, cit.; Costello, C. (2011). Citizenship of the Union, cit.

43 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 3, 14; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 3.

44 Carens, J.H. (2013). *The Ethics of Immigration.* Oxford: Oxford University Press, p. 185 *et seq*.

45 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 14.

46 Ibid., p. 7, 129 et seq., p. 166; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 69–70; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law: We the Burden?* London: Bloomsbury Publishing, p. 15 *et seq*.; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship. *Common Market Law Review* 47 (6), pp. 1597–1628,

relevant aspects to a single Member States, on the other hand, fall outside the scope of EU law.[47]

The purpose of introducing the right to family reunification as an ancillary to free movement rights was to facilitate the movement that would contribute to the establishment of the internal market. Not being able to bring one's family was considered to be an obstacle to move, and removing that obstacle by facilitating family reunification was expected to increase the chance that workers and self-employed would go abroad. Moreover, it was thought that being able to enjoy family life in the host country would diminish the need to retain strong ties to the home Member State, which would stimulate integration in the host Member State and, again, facilitate free movement.[48] Nationals who resided in their own Member State, on the other hand, did not contribute to the establishment of the internal market. They were thus not protected by EU law and not eligible for the family

1614; Dautricourt, C., and Thomas, S. (2009). Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope? *European Law Review* 34 (4), pp. 433–454, 454, 436; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit., p. 13 *et seq*.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule: Time to Move On. *Common Market Law Review* 39 (4), pp. 731–771. An exception to this economic rationale for conferring family reunification rights seems to have emerged in the Ruiz Zambrano case-law, in which a residence right was granted to the Colombian parents of Belgian children by virtue of them being an EU citizen and enjoying the right to reside, rather than contributing to the economic objectives of the internal market. To discuss these rights falls outside the scope of this contribution, however, which focuses only on the applicability and analogous applicability of Directive 2004/38, after exercising free movement rights. For reliance on these rights the requirement to make use of free movement rights has persisted. Also see infra, footnote 58.

47 Art. 3, para. 1, of Directive 2004/38, cit.; case-law e.g., Court of Justice, judgment of 7 February 1979, case 115/78, *Knoors v. Staatssecretaris van Economische Zaken*, para. 24; judgment of 28 March 1979, case 175/78, *The Queen v. Saunders*, para. 11; judgment of 27 October 1982, joined cases 35 and 36/82, *Morson and Jhanjan*, para. 18; judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Uecker and Jacquet*, para. 16; *O. and B.*, cit., para. 36; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 7–10, 42–44, 49–50; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 5–6, 19, 21–26, 69–70; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 49; O'Leary, S. (2009). The Past, Present and Future of the Purely Internal Rule in EU Law, cit., p. 13 *et seq*.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule, cit., p. 731.

48 Berneri, C. (2017). Family Reunification in the EU, cit., p. 8; Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 30; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 96 *et seq.*; Recitals 18, 23–24 of the Preamble of Directive 2004/38, cit.

reunification rights guaranteed by EU free movement law. Additionally, it was assumed they did not need EU law protection to secure their right to reside and work, because by virtue of their national citizenship they already enjoy those rights indiscriminately.[49] The rights that were provided to them by national law did not always, however, include a right to family reunification that was comparable to the equivalent right in EU law. As a result, when the national legislation that applies to these citizens offers other or less rights than EU law does, they are reversely discriminated in comparison with nationals from other Member States who do benefit from EU law for the purpose of family reunification.[50]

In general, Member States do not "want to discriminate against their own nationals", but reverse discrimination occurs "because [Union] law obliges States to treat nationals of other Member States in a way which – by reasons of their own policies and aims – they did not originally intend to treat their own nationals".[51] Thus, when national legislation infringes EU free movement law, it must only be set aside for EU citizens who, by virtue of their movement to another Member State, fall within the scope of EU law. Nationals of the concerned Member State who did not make use of free movement rights, on the other hand, fall outside the protection of EU law, so to them the national legislation continues to apply and as a result they are reversely discriminated. "Reverse discrimination is [thus] a side effect of the limited scope of application of EU law".[52] In other cases, reverse discrimination may be "a deliberate choice of the national legislator to (continue to) apply stricter conditions to purely internal situations in order to pursue their own national policy".[53] For family reunification, this deliberate choice is made by several of the Member States, including Belgium and the Netherlands.[54]

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49 Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras. 28–29; *O. and B.*, cit., para. 42; Art. 3 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto.

50 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 7; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 69 *et seq.*; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 15 *et seq.*; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship, cit., p. 1597 *et seq.*, especially p. 1614.

51 Poiares Maduro, M. (2000). The Scope of European Remedies, cit., p. 127; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 4.

52 Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 42.

53 Ibid., pp. 4–5. In some cases, Member States may introduce stricter requirements to advantage their own nationals (i.e. requiring stricter qualifications of specific professionals as a quality guarantee) but this is not the case in family reunification law.

54 Ibid.

The viability of continuing to uphold the economic premises on which the EU was built and to continue to allow the existence of reverse discrimination can be questioned, of course, and if the EU does not start to prioritize the inclusion of its citizens more than it does now, its legitimacy may be seriously undermined.[55] At the same time, the EU Treaties provide constitutional protection to EU citizenship and the principle of equality, as well as to the division of competences. Reconciliation of these principles should, therefore, take place within the boundaries of those Treaties, within the EU's constitutional system. In exploring possible reconciliation, some scholars have examined whether reverse discrimination should fall within the scope of Art. 18 TFEU, which prohibits discrimination on the grounds of nationality.[56] The Court of Justice rejected this possibility, however, because the difference in treatment did not constitute "an obstacle to the construction of the internal market".[57]

55 E.g. Kochenov, D. (2010). Citizenship Without Respect, cit.; Kochenov, D. (2008) Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights. *Columbia Journal of European Law* 15 (2), pp. 169–238; Kostakopoulou, D. (2007). European Union Citizenship: Writing the Future. *European Law Journal* 13 (5), pp. 623–646; Kostakopoulou, D. (2005). Ideas, Norms and European Citizenship: Explaining Institutional Change. *The Modern Law Review* 68 (2), pp. 233–267; Kostakopoulou, D., and Kostakopoulou, T. (2001). *Citizenship, Identity, and Immigration in the European Union: Between Past and Future.* Manchester: Manchester University Press; O'Brien, C. (2017). *Unity in Adversity*, cit.

56 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law,* cit., p. 18 et seq.; Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*, paras. 123–150; Spaventa, E. (2004). From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution. *Common Market Law Review* 41(3), pp. 743–773, 771; Spaventa, E. (2017). Earned Citizenship, cit., p. 204 et seq., especially p. 204; Spaventa, E. (2009). Seeing the Wood Despite the Trees, cit., pp. 13–45; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., pp. 16–19; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on *Dereci*. *European Law Review* 37 (2), pp. 176–190, 188 *et seq*.

57 Court of Justice, judgment of 18 February 1987, case 98/86, *Ministére public v. Mathot*, paras. 7–8; judgment of 15 January 1986, case 44/84, *Hurd v. Jones*, paras. 54–56; judgment of 23 October 1986, case 355/85, *Driancourt v. Cognet*, paras. 10–11; judgment of 16 June 1994, case C-132/93, *Steen v. Deutsche Bundespost*; judgment of 29 January 2004, case C-253/01, *Krüger*; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 18 *et seq*.; VERBIST, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 25 *et seq*.; Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 16 *et seq*.; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States, cit., p. 188 *et seq*.; Spaventa, E. (2017). Earned Citizenship, cit., p. 204 *et seq*. The restricted applicability of Art. 18 TFEU is also mentioned in the provision itself, which limits its applicability to those cases that fall "within the scope of the Treaties". See: Neuvonen, P.J. (2016). *Equal Citizenship and Its Limits in EU Law*, cit., p. 18 *et seq*.

An alternative option for reconciliation could be that reverse discrimination can exist within reasonable boundaries of equality. These reasonable boundaries are not to be considered as fixed limits to reverse discrimination that should be enforced by the EU or its Member States, but as a balancing exercise that mitigates some of the inequality that is caused by the system without defying the division of competences. In this way, a solution could be found in finding "a way around" reverse discrimination and become more equal, so to say. For family reunification rights, the Court seems to have adopted such an approach in its case-law.[58] It did so, for instance, by making the entitlement to the status of a worker dependent on a communitarian concept of being a worker instead, which ruled out the relevance of national interpretations.[59] Expanding the scope of the freedom of workers also expanded the scope of potential beneficiaries to the family reunification rights that are attached to

58 Here I only discuss family reunification rights on the basis of Art. 21 TFEU and Directive 2004/38, cit. Family reunification rights derived from Art. 20 TFEU pursuant to the *Ruiz Zambrano* line of case-law is left out of the analysis. *Ruiz Zambrano* concerned a purely internal situation which was brought within the scope of EU law, because expulsion of the Colombian parents would force their Belgian children to leave the territory of the EU (in order to follow the parents), which would deprive them of the genuine enjoyment of the substance of the rights they enjoy by virtue of their citizenship. In literature it has been discussed extensively whether and to what extent the Art. 20 TFEU case-law could remedy the lack of protection for EU citizens who reside in their own Member State and have never made use of free movement law. E.g. Kochenov, ed. (2017). *EU Citizenship and Federalism*, cit., discusses among other issues the question to what extent this line of case-law has added to give true meaning to European citizenship through a critical lens. Other examples of relevant sources are: Hailbronner, K., and Thym, D. (2011), Case C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*. *Common Market Law Review* 48 (4), pp. 1253–1270; Van Elsuwege, P. (2011). Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law – Case No. C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*. *Legal Issues of Economic Integration* 38 (3), pp. 263–276; Adam, S., and Van Elsuwege, P. (2012). Citizenship Rights and the Federal Balance Between the European Union and Its Member States, cit., p. 176 *et seq*.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention, cit.; Van Eijken, H., and DE Vries, S. (2011). A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano. *European Law Review* 36 (5), pp. 704–721; Kochenov, D. (2013). The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal* 19 (4), pp. 502–516; Kochenov, D. (2011). A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1), pp. 56–109; Kroeze, H.H.C. (2019). The Substance of Rights – New Pieces of the Ruiz Zambrano Puzzle. *European Law Review* 41 (2), pp. 238–256.

59 Court of Justice, judgment of 3 July 1986, case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, para. 21; judgment of 23 March 1983, case 53/81, *Levin v. Staatssecretaris van Justitie*, para. 23; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 295 *et seq*.; Barnard, C. (2013). *The Substantive Law of the EU*, cit., p. 240.

the status of a worker. Similarly, the Court has always refused to introduce a fixed income requirement for family reunification. Instead, sufficient resources are assessed on a case-by-case basis.[60] Additionally, and most important for this contribution is the earlier mentioned line of case-law which entails that when an EU citizen who has made use of the free movement of persons rights returns to his home Member State, the situation is no longer considered purely internal and is brought within the scope of Union law. The benefit that stems from continuing to fall within the scope of EU law is that EU citizens' family members who acquired a residence right in the host state can retain those rights when they return to the home Member State of their EU family member. The only condition to retain these rights is that residence in the host Member State must have been genuine.[61] If that is the case, the family member does not need to comply with the conditions for family reunification that are posed by the national law of that Member State.[62] The case-law is motivated by the same economic discourse on which European integration was built, and in essence, entails that effectively exercising economic freedoms also implies the possibility to rely on EU law upon return to the home Member State. Safeguarding the effectiveness of EU law is critical because otherwise an individual could be deterred from using his rights in the first place.[63]

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60 Art. 7, para. 1, let. b), of Directive 2004/38, cit.; Court of Justice, judgment of 10 April 2008, case C-398/06, *Commission v. Netherlands*; judgment of 19 September 2013, case C-140/12, *Brey*; Minderhoud, P.E. (2015). Sufficient Resources and Residence Rights Under Directive 2004/38. *Nijmegen Migration Law Working Papers Series* 3/2015.

61 *O. and B.*, cit., paras. 51–61; *Coman and Others*, cit., paras. 24, 40, 51–53.

62 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Departmen*t, cit.; *Akrich,* cit.; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.; *Coman and Others*, cit.; *Altiner and Ravn*, cit.; *Banger*, cit.; Watson, P. (1993). Free Movement of Workers – A One Way Ticket? Case C-370/90 The Queen v. Immigation Appeal Tribunal and Surinder Singh. *Industrial Law Journal* 22 (1), pp. 68–77; Bierbach, J. (2008). European Citizens' Third-Country Family Members and Community Law, cit., p. 344 *et seq*.; Costello, C. (2009). Metock, cit.; Cambien, N. (2009). Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, cit., p. 321 *et seq*.; Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers, cit., p. 753 *et seq*.; Van Eijken, H. (2014). De Zaken S. en G. & O. en B.: Grenzeloze Gezinnen en Afgeleide Verblijfsrechten. *Nederlands Tijdschrift voor Europees Recht* 10, pp. 319–324.

63 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., paras. 19–20; *Akrich*, cit., paras. 53–54; *Eind,* cit., paras. 35–36; *Metock and Others*, cit., paras. 64, 89–92; *O. and B.*, cit., paras. 46, 52–54; *Coman and Others*, cit., para. 24; *Altiner and Ravn*, cit., *Banger*, cit., para. 28; for a closer look upon the rationale of this doctrine, see the Opinion of AG Bobek delivered on 10 April 2018, case C-89/17, *Rozanne Banger*, paras. 27–47; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 10–13, 41, 96–106, 114–118; Davies, G. (2003). *Nationality Discrimination in*

The case-law of the Court empowers individual citizens to bring themselves within the scope of EU law and benefit from more lenient rules applicable to family reunification, and can, thus, be considered as a form of reconciliation for those who are reversely discriminated. At the same time, this reconciliation requires movement to another Member State which can be unaffordable (due to finances or language barriers), in particular, because residence in the host state must be genuine before rights can be retained in the home Member State.[64] This means that EU citizenship and the pertaining family reunification rights are reserved for the privileged "good" citizens who can afford to move and thus contribute to the internal market.[65] Another issue that is revealed when the scope of EU law is enhanced, is that it becomes increasingly difficult to justify why some citizens are still not included.[66] It is acknowledged that the approximation of legal regimes and the empowerment of citizens is limited and compromised by these liabilities but it may be as much as is feasible within the constitutional limitations of EU law. Further remedies to reverse discrimination should then come from the legislator and ultimately from the Member States.[67] They should take their responsibility in the EU as a co-legislator in the Council of Ministers or – when the EU lacks the competence to do so – outside the EU by resolving reverse discrimination on the basis of national law. Some of the Member States such as France, Italy and Austria, indeed, assumed this responsibility when their respective national courts decided that the principle of equality, that is protected by their own constitution, prohibits reverse discrimination.[68] This approach has led to the extended application of EU law to those situations, on the basis of national law. The solution does not eliminate the purely internal rule but it does eliminate reverse discrimination. It is called "voluntary adoption", "spontaneous harmonization" or "renvoi".[69]

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the European Internal Market, cit., p. 119 *et seq*.; Nic Shuibhne, N. (2010). The Resilience of EU Market Citizenship, cit., p. 1612.

64 *O. and B.*, cit., paras. 51–61; *Coman and Others*, cit., paras. 24, 40, 51–53.

65 Kochenov, D. (2017). On Tiles and Pillars, cit., pp. 59–62; Azoulai, L. (2017). Transfiguring European Citizenship, cit., p. 178 *et seq*.; Spaventa, E. (2017). Earned Citizenship, cit., p. 220 et seq.; O'Brien, C. (2017). *Unity in Adversity*, cit.

66 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 116 et seq.; Nic Shuibhne, N. (2002). Free Movement of Persons and the Wholly Internal Rule, p. 731 *et seq*.; Nic Shuibhne, N. (2002). The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body? In: Beaumont, Lyons, and Walker, eds., *Convergence and Divergence in European Public Law.* Oxford: Hart Publishing, 2002, pp. 177, 192.

67 For instance on the basis of Art. 79 TFEU.

68 Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 121–123.

69 Ibid., p. 123.

Another component of the protection of the family that mustn't be forgotten, lastly, is the protection of Art. 8 ECHR. The Court of Justice recalled in its case-law that if EU law does not provide entitlement to a residence right "regard must be had to respect for family life under Article 8" of the ECHR.[70] As was mentioned in the introduction, the protection of family life does not give an entitlement to choose the country of matrimonial residence.[71] Quite the opposite, the ECHR is intentionally silent on matters of immigration. Admission to a Member State can, therefore, only be examined "through the effects of state measures on other human rights of the foreigners concerned".[72] In addition, the Member States are awarded a margin of appreciation in their decision-making. As a result, the European Court of Human Rights only examines whether the decision was reasonable, and does not go into the choices of national policy, which are made by the Member States.[73] Nevertheless, the Court shows a readiness to "correct intolerable outcomes in individual cases",[74] which gives an alternative prospect to those who do not and cannot benefit from EU law for the purpose of family reunification.[75]

III Abuse of EU Law – Definition and Background

Since 1974, the concept of law abuse is part of EU law.[76] Its coming into being was inspired by the use of the concept in some of the Member States, even

70 *Akrich*, cit., para. 58; a few years later it mentioned in *Metock and Others*, cit., para. 79, that even though reverse discrimination does not fall within the scope of EU law, the Member States are all parties to the ECHR. In more recent cases such as *O. and B.*, cit., *Coman and Others*, cit., *Altiner and Ravn*, cit., and *Banger*, cit. the Court has neglected to refer to the ECHR but this does not mean that its complementarity ceased to exist.

71 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

72 Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 103.

73 Ibid. p. 103 *et seq*.; Van Elsuwege, P., and Kochenov, D. (2011). On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law* 13 (4), pp. 443–466, 461 *et seq*.

74 Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 107.

75 Van Elsuwege, P. and Adam, S. (2017). EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification. In: Kochenov, ed. (2017). *EU Citizenship and Federalism*, cit., pp. 443–467, especially p. 460 *et seq*.

76 Either as a general principle or as a "principle of construction" but, in any case, the Court of Justice takes recourse to the principle in its case-law, e.g. Court of Justice, judgment of 3 December 1974, case 33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*;

though, not all Member States are familiar with it in the same way.[77] As was mentioned above, abuse of law was introduced to resolve some of the tension between the effective use of EU law and judicial protection of those who use it while maintaining the preservation of the Member States' competence to regulate internal situations. This helps to distinguish between genuine use of EU law within the limits that are set by the Court of Justice and use of EU law that is meant to circumvent national law, which is, therefore, not a genuine use of EU rights. Member States' reliance on abuse of law thus protects the division of competences in a sensitive area of law. Nevertheless, applying abuse of law in an EU context also causes the restriction of EU rights. Therefore, invoking abuse of law is dependent on the scope of interpretation of abuse of law that is given by the Court of Justice. When EU rights are constructed and interpreted extensively by the Court, it is more difficult for the Member States to invoke abuse of law, even when their national laws are being circumvented. When these rights are more narrowly defined by the Court, it is easier to invoke abuse of law to restrict rights that go beyond their original purpose.[78] In other words, the broader the interpretation of EU free movement law, the less discretion there is to rely on abuse of law for the Member States and vice versa.[79]

This sensitivity is reflected in the development of the principle of abuse in EU law. In the course of the relevant case-law on abuse of law, a paradigm-shift can be observed from the essential purpose towards the sole purpose doctrine. The first doctrine entails that when the essential reason to invoke Union law does not tally with its purpose, this is classified as abuse of law, regardless of whether an additional legitimate purpose – which was not the essential purpose – for invoking the law can be found. Abuse of law is easily assumed.[80] The sole purpose doctrine, on the other hand, entails that abuse of law can only be ascertained when there is no other objective distinguishable

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De La Feria and Vogenauer, eds. (2011). *Prohibition of Abuse of Law*, cit.; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax. *Common Market Law Review* 45 (2), pp. 395–441, 436.

77 And those who do use the principle show considerable differences in the scope with which they apply it. De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 395.

78 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 297.

79 Ibid.

80 Court of Justice, judgment of 21 June 1988, case 39/86, *Lair v. Universität Hannover*; Vanistendael, F. (2011). Cadbury Schweppes and Abuse from an EU Tax Law Perspective. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. 295–314; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit.; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

but the circumvention of national law.[81] In that understanding of abuse of law, the mere fact that a person consciously places himself in a situation through which a certain right can be obtained does not in itself constitute sufficient basis to assume that there is an abuse of law.[82] This doctrine is based on the notion that as long as a right is invoked in a genuine and effective manner, there can be no abuse.[83] Thus here, the scope of the concept's applicability is narrow.

The Court first introduced the concept of abuse of law in 1974 in Van Binsbergen. The case concerned a Dutch lawyer who wanted to circumvent the professional rules of conduct that were applicable to him in the Netherlands by establishing himself in Belgium. Dutch law provided, however, that legal representatives should reside in the Netherlands. Van Binsbergen argued that this rule was contrary to the freedom to provide services. The Court of Justice did not follow this argument and ruled that "[a] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory [...] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state".[84] The formulation of the Court in Van Binsbergen seemed to award a broad discretion to the Member States, by implying that all circumvention of national rules could be contested and give reason to restrict the individual's rights.[85]

Van Binsbergen was followed by the so-called "Greek Challenge" cases. These cases concerned the reliance of shareholders of Greek public limited liability companies on Directive 77/91/EEC on the protection of their rights in the context of alterations in the capital of the company. The Greek government classified these claims as abuse of EU law, and the national courts asked for clarification from the Court of Justice. The Court of Justice considered that, despite the right of the Member States to combat abuse of law, reliance on this concept should not undermine the effectiveness and uniformity of EU law.[86]

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81 Court of Justice, judgment of 21 February 2006, case C-255/02, *Halifax and Others*; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit.; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

82 *Centros*, cit., para. 27.

83 *Levin v. Staatssecretaris van Justitie*, cit.; Court of Justice, judgment of 12 September 2006, case C-196/04, *Cadbury Schweppes and Cadbury Schweppers Overseas*.

84 *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit., para. 13; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 399 *et seq*.; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 54 *et seq.*

85 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 403 *et seq*.

86 Court of Justice: judgment of 12 March 1996, case C-441/93, *Patifis and Others*, para. 68; judgment of 12 May 1998, case C-367/96, *Kefalas and Others*, paras. 22–28; judgment of

Hence, the discretionary competence to apply abuse of law was restricted and the concept started to obtain a communitarian meaning. In Centros, the Court further restricted the Member States' discretion to invoke abuse of law. The case concerned Danish entrepreneurs who established their company in the United Kingdom with the sole aim of avoiding Danish law on minimum capital.[87] When the company wanted to open a branch in Denmark, the Danish authorities refused access to the Danish market, because according to them the company had abused EU law on freedom of establishment. The Court decided differently and considered that the mere fact that a person consciously places himself in a situation through which a certain right can be obtained, does not in itself constitute an abuse of law. The right to choose the Member State with the least restrictive company law to establish a company is "inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".[88] Similarly to Van Binsbergen, the company in Centros had made use of a U-turn construction to circumvent national law. Because the Court allowed this, it follows from its judgment that circumvention of national law does not always qualify as abuse of law.[89] Where Van Binsbergen was an example of the essential purpose doctrine, with Centros the Court started to move towards a sole purpose doctrine.

It also follows from Centros that a distinction is made between use and abuse of EU law. Use of EU law cannot lead to restriction of rights, whilst abuse can. The question arose how it is possible to distinguish between use and abuse of rights. The Court answered this question in Emsland-Stärke, which can be used to determine whether a case can be classified as abuse of law. Like the earlier cases, Emsland-Stärke concerned a U-turn construction. The company exported a potato-based product from Germany to Switzerland for which it received an export refund. After the export, they immediately returned the products to Germany and sold them there. The question was whether this practice was abuse of EU law, which could justify the denial of the export refund. The Court considered: "A finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element

23 March 2000, C-373/97, *Diamantis*, paras. 34–39; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 404.

87 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

88 *Centros*, cit., para. 27; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

89 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 405 *et seq*.

consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it".[90] By introducing this two-component test to assess possible abuse of law, the Court strongly restricted the discretionary competence of the Member State to decide on the lawfulness of the use of EU law and gave the concept of abuse a communitarian meaning.[91] Emsland-Stärke was broadly discussed. The subjective element of the test was contested because of the difficulty to determine subjective intentions, and the question was asked whether Emsland-Stärke could be transposed to other fields of EU law.[92] The Court responded to these questions and criticism in Halifax.[93] This case concerned a banking company whose financial services were tax-exempted. Accordingly, when the company established new call-centres, Halifax could only recover 5 per cent of the Value Added Tax (VAT) paid on the construction works. By developing a system of a series of transactions involving different companies of the Halifax group, it was, nevertheless, able to recover effectively the full amount of VAT. The question in this case was whether reliance on the right to deduct VAT, when the transactions on which the right was based were solely effected for that particular purpose, would be an abuse of rights. By applying the Emsland-Stärke test to the area of VAT, it was understood that the two components test would become the standardized test for abuse of law.[94] Furthermore, Halifax seemed to respond to the criticism about the subjective element of the test by objectifying it. The Court considered: "An abusive practice will be found to exist where [...] it is apparent from a number of objective factors, such as the

90 *Emsland-Stärke*, cit., para. 52. Up until today the test is repeated in cases such as Court of Justice, judgment of 22 December 2010, case C-303/08, *Bozkurt*, para. 47; judgment of 16 October 2012, case C-364/10, *Hungary v. Slovakia*, para. 58; *O. and B.*, cit., para. 58; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 408 *et seq*.

91 Vanistendael, F. (2011). Cadbury Schweppes and Abuse from an EU Tax Law Perspective, cit., p. 295 *et seq*.; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 408 *et seq*.

92 Weber, D. (2004). Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, *EmslandStärke*. *Legal Issues of Economic Integration* 31 (1), pp. 43–55.

93 *Halifax and Others*, cit.; De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. xv-xvi; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 421 *et seq*.; Lenaerts, A. (2010). The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law. *European Review of Private Law* 18 (6), pp. 1121–1154.

94 *Halifax and Others*, cit.; Lenaerts, A. (2010). The General Principle of the Prohibition of Abuse of Rights, cit.; De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., pp. xv-xvi; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 421 et seq.

purely artificial nature of the transactions and the links between operators involved in the scheme, that the essential aim of those transactions concerned was to obtain a tax advantage".[95]

In Cadbury Schweppes, the Court extended the scope of application of the Emsland-Stärke test, again, to the field of corporate taxation. The case was similar to Centros and concerned a UK based company that exercised an economic activity on the Irish market. To counter tax-avoidance, the UK had established a tax on the income from Ireland, which was disputed before the Court of Justice. The Court reiterated the doctrine it had developed until then. It considered that nationals of a Member State are not supposed to "improperly circumvent national legislation" or "improperly or fraudulently take advantage of provisions of Community law". Yet, the establishment of a branch in another Member State "for the purpose of benefitting from the favourable tax regime [...] does not in itself constitute abuse".[96] The freedom of establishment may, thus, only be restricted to prevent "wholly artificial arrangements", equated with abuse.[97] To establish the existence of a "wholly artificial arrangement", the EmslandStärke test should be applied.[98] Cadbury Schweppes can be understood as another step of the Court from the essential purpose towards the sole purpose doctrine. This is because the existence of a purpose aside from constructing a "wholly artificial" situation to benefit from EU rights precludes classification as abuse of law. The existence of such an additional purpose, which legitimizes the use of EU law, is recognized when the objective of free movement rights has been achieved and reflected in economic reality.[99] " '[P]lanning without abuse' is a legitimate activity, [and] is reminiscent of the idea of 'legitimate circumvention' expressed both in Centros, and in the post-Centros decisions on establishment", as long as the rights are effectively exercised.[100]

95 *Halifax and Others*, cit., paras. 74, 75, 81; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 422.

96 *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit., paras. 35–37.

97 Ibid., para. 57.

98 Ibid., paras. 64–65; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 425 et seq.

99 *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit., paras. 64–65; De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 427.

100 De La Feria, R. (2008). Prohibition of Abuse of (Community) Law, cit., p. 423 *et seq*.; For a more recent analysis of circumvention of national law for economic purposes by corporations see Costamagna, F. (2019). At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or Just Law Shopping? *European Papers* 4 (1), pp. 185–205.

IV Abuse in the Context of Family Reunification Rights

In comparison with abuse of law in the context of tax law and free movement of services, abuse of law in the context of free movement of persons is a bit of an oddity. Scholars tend to either observe the "full rejection of the impact of the concept of abuse of law within the field of free movement of workers and citizenship"[101] or its reduction to a "merely verbal acceptance as a legal principle" in free movement law.[102] The first case in which this became apparent was Lair.[103] The question was whether a short period of being a worker was sufficient to be eligible for student assistance in the host state on the basis of non-discrimination in comparison with the population of that State. German law provided that a worker would only be eligible after a period of five years of employment. The Court considered that

> [i]n so far as [...] the three Member States [...] are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question.[104]

In the field of free movement, the Court, thus, relied on the sole purpose doctrine avant la lettre, about a decade before it was further developed in Centros and subsequent case-law.

This dichotomy between free movement of persons and the other freedoms is not unique[105] and it is often defended on the basis that human beings should, indeed, be treated differently than economic transactions.[106] Nevertheless,

101 La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., p. xviii.

102 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 306.

103 *Lair v. Universität Hannover*, cit.

104 Ibid., para. 43.

105 Snell, J. (2004). And then There Were Two: Products and Citizens in Community Law. In: Tridimas and Nebbia, eds., *European Union Law for the Twenty-first Century: Volume II*. Oxford: Hart Publishing.

106 De La Feria, R. (2011). Introducing the Principle of Prohibition of Abuse of Law, cit., p. xix.; Opinion of AG Jacobs delivered on 8 March 1989, case 344/87, *Bettray v. Staatssecretaris van Justitie*, paras. 28-19, referring to recital 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community, *OJ L 257*, 19.10.1968, p. 2–12.

even in the context of free movement rights, the Court does not preclude the existence of abuse and the discretion of the Member State to take measures against it. On the contrary, it has repeatedly confirmed that Member States are allowed to take measures to prevent possible abuse. The question remains how such a situation can be distinguished from a genuine use of free movement rights. To answer this question, the text of Directive 2004/38 and the pertaining Communication on its application, that is issued by the Commission, are further examined, as well as the case-law of the Court of Justice.

Art. 35 of Directive 2004/38 holds that "Member States may adopt the necessary measures to refuse, terminate, or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience".[107] One type of abuse of EU law is already mentioned in the provision, namely the attainment of a residence right on the basis of a marriage of convenience.[108] The wording of Art. 35 implies, however, that potentially other unspecified usages of the Directive could also be classified as abuse. The legislator thereby created an – additional – open possibility for the limitation of rights, which leaves a legislative gap.[109] The question that is answered here is whether the U-turn construction to acquire a residence right for a family member, by relying on EU law and thereby circumventing national law, also constitutes such an abuse of law or not.

V The Case-Law of the Court of Justice on Family Reunification Law Abuse

The first case of the Court of Justice that mentioned the possibility that law may be abused in the context of family reunification was Surinder Singh.[110] In this case, the Court recognized the possibility that relying on family reunification rules, in the context of free movement, can constitute abuse of law and that Member States can act against it. It considered: "the facilities created

107 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 297 *et seq*.

108 *Akrich*, cit., para. 57.

109 Boeles, P., Den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law*, cit., p. 63; Costello, C. (2011). Citizenship of the Union, cit., p. 321 *et seq*.

110 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit. This case took place before Directive 2004/38 was adopted. Hence, there was no general legislative provision for abuse yet. It may even be perceived that Art. 35 of Directive 2004/38, cit., is a codification of this aspect of Surinder Singh. Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 298; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., p. 117 *et seq*.

by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse".[111] The Court did not yet specify what types of behaviour could constitute such abuse. Instead, it created the possibility for the use of EU law to circumvent national family reunification rules, by establishing that once a family member acquires a residence right in the host state, where an EU citizen resides, he is able to retain these rights upon return to the home state of the EU citizen, which was discussed above. Years later, the Surinder Singh exception to the purely internal situation was confirmed in Akrich, Eind, Metock and in O. and B. and continues to be applicable law.[112] How does the possibility to apply this U-turn construction in the field of family reunification relate to the general doctrine on abuse of law? Can it be considered to be abuse of law, and if yes, under which circumstances?[113]

Akrich was a first test-case in the context of free movement and family reunification and involved a British-Moroccan couple who applied the U-turn construction to legalize the residence status of the Moroccan spouse. To achieve this, the couple moved to Ireland where the British spouse took up a temporary job, entitling the Moroccan partner to a residence right. When they wanted to return to the UK, they admitted that the only reason they moved to Ireland was to acquire a residence right for the Moroccan spouse on the basis of EU law.

111 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit., para. 24; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 101.

112 *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Akrich*, cit.; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.; *Coman and Others*, cit.; *Altiner and Ravn*, cit.; *Banger*, cit.; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 58 *et seq*.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., pp. 101–114; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, cit., pp. 103–106.

113 must also be noted that Art. 35, on abuse, was not in the original legislative proposal of the Commission and was added by the Council in a later stage of the negotiations (Council Common Position (EC) 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, statement of reasons on Art. 35). Although the Court had identified the issue of abuse before, it appears that its assertion by the Council was mainly symbolic, as a manifestation of their sovereignty, and they had not thought through which cases aside from marriages of convenience could constitute abuse. It is, thus, logical that this question arose later. Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 297 *et seq*.

The Court considered that when an EU citizen "pursues or wishes to pursue an effective and genuine activity",[114] this cannot constitute an abuse within the meaning of the Surinder Singh judgment. "If there is a genuine exercise of an economic activity as defined by the Court of Justice, its preconditions cannot at the same time be created artificially".[115] Moreover, for the evaluation of the nature of the activity that is pursued, "the motives [...] are of no account [...] nor are [they] relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national".[116] The Court, thus, seemed to deviate from the two-step abuse of law test that was formulated in Emsland-Stärke because, in Akrich, the subjective element of this test had become inoperative.[117] At the same time, the subjective element of the test was hollowed in Halifax and would be hollowed even further in Cadbury Schweppes, a couple of years after Akrich. Did the Court in Akrich deviate from its standing practice by completely excluding the relevance of motive to establish abuse of law in the context of free movement law? Or should the Court's leniency in this case be attributed to the general development of the EU's case law on abuse of law, in which the subjective element of the two-step abuse test from Emsland-Stärke was declining anyway?

It followed from Akrich that the use of free movement law to acquire the rights that are attached to it cannot be qualified as abuse, as long as the use of these rights is effective and genuine. This criterion is derived from the case-law on free movement of workers, which is laid down in Art. 45 TFEU. In Lawrie-Blum, the Court reiterated that the concept of a "worker" should have a communitarian meaning to avoid discrepancies in interpretation among the Member States. One of the criteria to qualify as a worker under EU law is that the provided services are effective and genuine and rewarded with a remuneration.[118] When the exercise of free movement rights is effective and genuine, there cannot be an abuse of EU law.[119] By defining a broad scope for free

114 In *Akrich*, cit., para. 55 (emphasis added).

115 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 305 *et seq.*

116 *Akrich*, cit. paras 55–56; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., pp. 59, 298; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 102.

117 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 305 *et seq*.

118 *Lawrie-Blum v. Land Baden-Württemberg,* cit., para. 21; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 300 *et seq*.; Barnard, C. (2013). *The Substantive Law of the EU*, cit., p. 240.

119 *Levin v. Staatssecretaris van Justitie*, cit., para. 23; *Akrich*, cit., para. 55; Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 300 *et*

movement law, the Member States do not have much leeway to invoke abuse of law to annul the rights that are attached to having the status of a worker in EU law.[120] The circumvention of national law is permitted, provided that the use of EU law is genuine and effective. The Court did not clarify, however, under what circumstances the use of free movement right is genuine and effective, and when it is not.

The shift in the Court's approach is in line with the development of its case-law more generally. The focus on genuine use of EU law is understandable in the light of the principle of effectiveness, which precludes easy derogation from EU law by the Member States. A narrow construction of abuse of law fits these principles because otherwise, Member States could rely on abuse of law to undermine EU law. The increasing role of fundamental rights protection in the EU is also reflected in the Court's case-law. A narrow understanding of abuse of law benefits certainty about their rights and future. Maybe that is why the Court first relied on a sole purpose approach to abuse of law in the context of free movement and family reunification law.

VI The Commission Communication with Guidelines for the Implementation of Directive 2004/38

A few years after the adoption of Directive 2004/38, the European Commission undertook an investigation into the implementation of the Directive in the Member States, which showed that uniformity was lacking and that much ambiguity still existed about the obligations it imposes.[121] To remedy the faulty implementation, the European Commission drafted its guidelines "for better transposition and application of Directive 2004/38".[122]

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seq.; Barnard, C. (2013). *The Substantive Law of the EU*, cit. p. 241. The question is raised, however, how the Court came up with the criterion of a genuine use of EU law, considering that it does not appear anywhere in the Treaties or in Directive 2004/38, see: Nic Shuibhne, N. (2014). The "Constitutional Weight" of Adjectives. *European Law Review* 39 (2), pp. 153–154, 154.

120 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 297.

121 Report of 10 December 2008 from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final.

122 Communication COM(2009) 313 final, cit.; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 299 *et seq*.

The Communication recites the general principle that "Community law cannot be relied on in case of abuse".[123] Nevertheless,

> [EU] law promotes the mobility of EU citizens and protects those who have made use of it. There is no abuse where EU citizens and their family members obtain a right of residence under [EU] law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State.[124]

The sole purpose doctrine which the Court developed in Akrich and subsequent case-law is clearly recognizable.

The Communication continues with a description of what behaviour could constitute abuse of law. Pursuant to the text of Art. 35 of Directive 2004/38, it starts with the definition of marriages of convenience. "Recital 28 defines marriages of convenience for the purpose of the Directive as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise".[125] Nevertheless, when the marriage is genuine, it "cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage".[126] Neither is the quality of the relationship decisive for the application of Art. 35 of Directive 2004/38. Analogously, other relationships that came into being "for the sole purpose of enjoying the right of free movement and residence" can be the subject of national measures to combat abuse, such as a (registered) partnership of convenience or the adoption or recognition of a child with the sole purpose to rely on the free movement legislation to acquire a residence right.[127] On the other hand, the Commission recalls that "[m]easures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate

123 *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, cit.; *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Centros*, cit.

124 Communication COM(2009) 313 final, cit., p. 15.

125 Ibid., p. 15.

126 Ibid.

127 Verhellen, J. (2016). Schijnerkenningen: Internationale Families Opnieuw in de Schijnwerpers. *Tijdschrift voor Internationaal Privaatrecht* 2, pp. 89–103.

rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality".[128]

Subsequently, a set of indicative criteria is given that can be used to determine whether there is an abuse of EU law. Among these are the duration of the relationship, whether the spouses share a common language, their knowledge about each other, the existence of long-term commitments such as concluding a mortgage and cohabitation – although it follows from the Court's case-law that cohabitation is not a requirement to qualify for a residence right on the basis of family reunification.[129] Member States must give due attention to all circumstances of the individual case and may not base a decision on one single element of the situation.[130] The Commission omits to support these instructions with reference to case-law. Nevertheless, several elements are recognizable. The instructions are clearly based on the sole purpose doctrine that is developed by the Court.[131] The genuine nature of the marriage is decisive, regardless of whether it brings any advantage to the spouses. The unimportance of the quality of the relationship for the classification of abuse, furthermore, follows from the case-law in Diatta and Ogieriakhi.[132] The amplification to other relationships of convenience, on the other hand, seems to be an addition by the Commission itself. In 2014, the Commission renewed the instructions on

128 Communication COM(2009) 313 final, cit., p. 15. It is notable that marriages of convenience are only annulled when they are concluded for a migration purpose. The legality of marriages concluded for tax advantages, housing advantages, or any other reason outside of reciprocal affection, on the other hand, is never disputed.

129 Court of Justice, judgment of 13 February 1985, case 267/83, *Diatta v. Land Berlin*, para. 15; judgment of 10 July 2014, case C-244/13, *Ogieriakhi*, para. 37.

130 Communication COM(2009) 313 final, cit., p. 16 *et seq.*; *McCarthy*, cit.

131 Applying the sole-purpose approach also corresponds with the rights that are laid down in the Family Reunification Directive 2003/86 which is applicable to family members of third-country nationals legally residing in the EU. Art. 16, para, 2, let. b), gives Member States the possibility to reject, withdraw, or refuse residence to a family member, when the marriage was "contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State" (emphasis added). According to the Court in *Metock and Others*, cit. it would be paradoxical if Directive 2004/38 would not minimally offer the same protection as Directive 2003/86. In this light it makes sense to assume that if a residence right derived from Directive 2003/86 is only annulled when the marriage that brought about that entitlement was concluded for the sole purpose of acquiring a residence title, the same rule can be applied to residence rights derived from Directive 2004/38. Following this logic, these residence rights can only be annulled when the marriage that brought about this entitlement was concluded for that sole purpose. Even though, remarkably, Art. 35 of Directive 2004/38 itself does not provide a definition of a marriage of convenience.

132 *Diatta v. Land Berlin*, cit., para. 15; *Ogieriakhi*, cit., para. 37.

the consequences of marriages of convenience in the "Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens". This handbook mostly contains the same principles and instructions which were included in the Commission Communication of 2009.[133]

In addition, according to the Commission,

> [a]buse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under [EU] law. The defining characteristics of the line between genuine and abusive use of [EU] law should be based on the assessment of whether the exercise of [EU] rights in a Member State from which the EU citizens and their family member(s) return was genuine and effective.[134]

Once again, the codification of the Court's case-law in Akrich, Levin, and Lawrie-Blum, which were discussed in the above, is apparent, as well as the applicability of the sole purpose approach to abuse in family reunification law. Genuine use of EU rights can never constitute abuse of law, regardless of the purpose for which the rights are used. If a planned circumvention of national immigration law is realized through such genuine use of EU rights, the circumvention is legitimate.

The assessment of whether the use of EU law is genuine and effective "can only be made on a case-by-case basis" and can be carried out on the basis of another set of criteria provided by the Commission Communication. Previous unsuccessful attempts to acquire residence for a third-country spouse under national law can be taken into account, as well as efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment and acquiring a job. Also here, due attention must be paid to all the relevant

133 Communication COM(2014) 604 of 26 September 2014 from the Commission to the European Parliament and the Council on helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.

134 Communication COM(2009) 313 final, cit., p. 17–18.

circumstances and a decision may not be based on one single element of the case.[135] Moreover, "[i]t cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State […] [and] [t]he mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse".[136]

Lastly, the Communication mentions that "the Directive must be interpreted and applied in accordance with fundamental rights […] as guaranteed in the European Convention of Human Rights (ECHR) and as reflected in the EU Charter of Fundamental Rights".[137] And that investigations into alleged abuse situations "must be carried out in accordance with fundamental rights, in particular with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR (Articles 7 and 9 of the EU Charter)".[138] In the light of this obligation and the interest of the families involved to live together with their loved ones, it is sequacious that abuse of law is interpreted narrowly and in accordance with the sole purpose approach.[139] Families thus enjoy more certainty about their rights and about their future.

VII Defining Genuine Use of EU Law – O. and B.

In the years after Akrich and the publiction of the Commission Communication, the Court of Justice was relatively silent on the doctrine of abuse of law in the context of family reunification,[140] until 2014, when O. and B. was handed down.[141] In this case, the Court reiterated its abuse of law doctrine and considered:

> [T]he scope of Union law cannot be extended to cover abuses […]. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved,

135 Ibid., p. 18–19.
136 Ibid., p. 18, with reference to *Centros*, cit., para. 27.
137 Ibid., p. 3; *Metock and Others*, cit., para. 79.
138 Communication COM(2009) 313 final, cit., p. 17.
139 See supra.
140 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 60 *et seq*; *Eind*, cit.; *Metock and Others*, cit.; *O. and B.*, cit.
141 *O. and B.*, cit.; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 108 *et seq*.

> and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.[142]

The Court, thus, re-established the Emsland-Stärke test to determine whether there is an abuse of law but also reiterated that there can only be abuse when the conditions under which a right is obtained are wholly artificial, which followed from Cadbury Schweppes.[143]

In O. and B., the Court clarified the condition that residence in the host Member State must have been effective and genuine before rights can be retained in a return situation. Effective and genuine exercise of EU rights requires:

> to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State […]. [A] Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State […]. […] Residence in the host Member State pursuant to and in conformity with the con ditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.[144]

A distinction is made between short-term travel and long-term settling in the host Member State in accordance with Art. 7 of Directive 2004/38. This provision determines that "[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they" qualify as a worker, selfemployed, economically not active with sufficient resources or as a student. The text of this provision seems to imply that Art. 7 can only be applicable after a minimum of three months of residence. O. and B. was, therefore, understood as the introduction of a requirement of a three months residence in the host-state, before a family member's residence right can be retained upon return to the home Member State of the EU citizen.[145]

142 *O. and B.*, cit.; para. 58 with reference to *Emsland-Stärke*, cit., para. 52; *Bozkurt*, cit., para. 47; *Hungary v. Slovakia*, cit., para. 58.

143 *Emsland-Stärke*, cit.; *Cadbury Schweppes and Cadbury Schweppers Overseas*, cit.

144 *O. and B.*, cit., paras. 52–53.

145 Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 303; Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 110 *et seq*.; Van Eijken, H. (2014). De Zaken S. en G. & O. en B., cit., p. 322 *et seq*.; Cambien, N. (2014). Cases C-456/

Such an interpretation means that the genuineness of the exercise of free movement rights is made dependent on a set period of three months of residence. However, is it sensible to link duration of residence with its genuineness in itself? And – if it is installed anyway – how can a minimum period of residence be determined for the use of rights to be genuine, without being inevitably arbitrary in posing this condition? "Why can a Union citizen who has lived for 3.5 months in another Member State, in which he met his partner be joined by her when he returns to this Member State of origin and why is this not possible for the Union citizen who visits another Member State for a period of many consecutive years?".[146] It seems hard to accept that the period of residence is decisive in itself for residence to be genuine, rather than being one of the relevant criteria to decide so.[147]

This contribution proposes a different interpretation of O. and B. Article 6 of Directive 2004/38 provides the right to visit any Member State for up to three months, without the need to fulfil any conditions to exercise that right. Art. 7 of Directive 2004/38 provides the right to reside in another Member State for a period of longer than three months when certain criteria are fulfilled. Accordingly, when an EU citizen wishes to have a right to reside in the territory of another Member States for a period of longer than three months, he must comply with the criteria in Art. 7. That does not mean that an individual cannot rely on Art. 7 and reside in a Member State in accordance with the criteria in that provision before those three months elapse. Any other conclusion would imply that exercising the rights derived from Art. 6 for three months is a precondition to rely on Art. 7 and to register at the municipality of residence. This is not the case. Such a condition is not included in Directive 2004/38 and would also be very difficult to enforce. As a result, it is already possible from the first day of arrival to register as a resident in accordance with Art. 7 of Directive 2004/38. Does this mean that even one day of residence in conformity with Art. 7 would already be sufficient to derive family reunification rights in the host Member State and upon return in the home Member State of the EU citizen?[148] And a family who resides in the host Member State for much longer than three months without complying with the conditions in Art. 7 of Directive 2004/38,

12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-State Requirement for EU Citizens? *European Law Blog*, available at europeanlawblog.eu.

146 Verbist, V. (2017). *Reverse Discrimination in the European Union*, cit., p. 112.

147 Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-456/12 and C-457/12, *O. and B. and S. and G.*, para. 111.

148 Although such a claim would give difficulty in regard of proving the existence of that right in compliance with the set conditions.

on the other hand, would be deprived of the rights provided by the directive in the host state and after return in the EU citizen's home Member State?[149]

Considering the Court's wording, it seems that the decisive criterion to retain a residence right upon return to the home Member State of the EU citizen is not the duration of residence but whether residence in the host state is "such as to create or strengthen family life in that Member State", which should be assessed on a case-by-case basis. Three months of residence in the host Member State in accordance with the conditions in Art. 7 of Directive 2004/38 could then be used as a presumption of having created or strengthened family life, rather than as a precondition. This interpretation is in line with the Court's wording in O. and B., in which it considered that "[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive [...] goes hand in hand with creating and strengthening family life in that Member State".[150] Thus, creation and strengthening of family life is presumed when there is a three months residence that is in conformity with Art. 7 of Directive 2004/38, but this does not exclude the possibility that a period of less than three months could also create or strengthen family life, provided that the residence is still exercised in conformity with Art. 7 of the Directive. This approach would allow for real case-by-case assessment of the use of rights, which, aside from the duration of residence, could take other parameters into account including cohabitation, intensity of the contact and the duration of the relationship. Residence for more than three months would not automatically lead to the retention of residence rights but would need to be complemented with other evidence that family life was created or strengthened. In addition, residence for less than three months would not automatically lead to the denial of the retention of residence rights but would need to be compensated with other evidence that family life was created or strengthened to be entitled to those rights. This reading furthermore excludes the possibility that a simple one day visit across the border would be sufficient to rely on the Court's case-law for return situations, which fits the objectives of EU law. Family reunification rights and the continuation thereof are meant to facilitate free movement, and this free movement is not hindered if family can not be brought for a single day visit to another Member State.

The proposed reading of O. and B. is further supported by a more recent case of the Court of Justice, which stems from 2018. Altiner and Ravn was about a Danish-Turkish couple who resided in Sweden for a couple of years. During

149 Spaventa, E. (2015). Family Rights for Circular Migrants and Frontier Workers, cit., p. 769 *et seq*.

150 *O. and B.*, cit., para. 53 (emphasis added).

this time, Altiner's Turkish son visited them twice for a total period of about 3,5 months with a valid Schengen visa, and stayed with them. When Ravn and Altiner returned to Denmark, the son applied for a residence permit as a family member of a Danish citizen in a return situation. Between their return and the son's application was a time window of little less than nine months. His request was denied, because according to the Danish authorities, his application was not 'a natural consequence' of Ms Ravn's return to Denmark. The authorities did not take a position on the question of whether the stay of the son in Sweden had created or strengthened family life between him and Ms Ravn.[151] The national court therefore asked the Court of Justice whether the Member State may require that the entry of a family member is a 'natural consequence' of the Union citizen's return?[152]

In answering the preliminary question, the Court considered that it 'is true that it is the genuine residence [in accordance with Article 7(1) and (2) of Directive 2004/38] of the Union citizen and of the family member who is a third-country national in the host Member State which creates, on the return of that Union citizen to the Member State of which he is a national, a derived right of residence on the basis of Article 21(1) TFEU for the third-country national with whom that citizen has live as a family in the host Member State'.[153] The Court of Justice then recalls that to obtain a derived residence right in the host Member State, it is not relevant at what time the family member joins the EU citizen, so an elapse of time between the arrival of the EU citizen and his family member should not stand in the way of family reunification.[154] The residence right that is granted in the Member State of origin of the EU citizen is, however, different in nature, and is meant to continue family life which has been created or strengthened in the host Member State. If this family life has been interrupted before the entry of the third-country national into the Member State of which the EU citizen is a national, this may affect the residence right in that Member State. Member States are allowed to verify whether such an interruption exists, and for that purpose they may take into account that the third-country national family member entered the territory of the EU citizen's home Member State a significant period of time after that citizen's return to

151 *Altiner and Ravn*, cit., para. 10–14. For an analysis of this case see in this volume De Groot, D.A. Free Movement of Dual EU Citizens; Oosterom-Staples, H. (2018). Noot bij HvJ EU 27 juni 2018, zaak C-230/17 (Altiner en Ravn) en HvJ EU 12 juli 2018, zaak C-246/17 (Banger). *Jurisprudentie Vreemdelingenrecht* 22 (11).

152 *Altiner and Ravn*, cit., para. 18.

153 *Altiner and Ravn*, cit., para. 20 and 26.

154 *Altiner and Ravn*, cit., para. 28–29.

that territory. At the same time, it cannot be ruled out that a family life, created or strengthened between a Union citizen and a third-country national family member in the host Member State might continue despite the fact that the EU citizen has returned to the Member State of which she is a national without being accompanied by the family member in question, who may have been obliged, for reasons relating to his personal situation, profession or education, to delay his arrival in the home Member State of the EU citizen.[155]

The Court concluded that the decisive criterion for a continuation of rights would be the existence of a link between the application for a residence right and the exercise by that citizen of his freedom of movement, which should be assessed as such. The fact that the submission of the application for a residence permit was not 'a natural consequence' of the return of the EU citizen is a relevant, but not a decisive factor in this assessment. Hence, the national authorities are allowed to weigh the question whether the application of the family member is 'a natural consequence' of the return of the EU citizen to the Member State of which he is a national, provided that other factors are also taken into account in the context of an overall assessment. This assessment should particularly take account of factors that are capable of showing that family life created and strengthened in the host Member State has not ended, in spite of the time which elapsed between the return of the Union citizen to that Member State and the entry of her third-country national family member. If family life continues to exist, this would justify the acknowledgment of a derived right of residence in the home Member State of the EU citizen to continue family life that was created or strengthened in the host Member State during the period of residence that was spend there.[156]

Altiner and Ravn confirms the conclusion that was derived from O. and B. The decisive criterion to retain a derived residence right for a family member of an EU citizen after a period of residence in another Member State is the existence of family life that was created or strengthened in the host Member State and continuated after the return to the EU citizen's home Member State. All other circumstances, such as the moment in time when the family member enters the Member State, or the period of residence of the EU citizen in the host Member State (provided that this residence was in accordance with Article 7 of Directive 2004/38), are relevant to be taken into account as part of the overall assessment of the creation, strengthening and continuation of family life in the home Member State. These factors cannot, however, be used

155 *Altiner and Ravn*, cit., para. 30–33.
156 *Altiner and Ravn*, cit., para. 34–35.

as fixed criteria on the basis of which an automatically generated decision on the legality of residence after return is issued.

VIII Abuse v. Non-Applicability of EU Law

Considering the abuse of law doctrine and the case-law of the Court in the field of family reunification, the question arises how abuse of law can be distinguished from the lack of fulfilment for the conditions of a right.[157] In O. and B., the Court reiterated the Member States' competence to combat abuse of law but it did not link abuse of law to the non-fulfilment of the criterion to have created or strengthened family life in the host Member State. Rather, it formulated a condition for the possibility to rely on Directive 2004/38 by analogy for family reunification after return to the home Member State. When this condition is not fulfilled, it is not a matter of abuse of EU law but a matter of non-compliance with the conditions for retaining a residence right in the EU citizen's home Member State after his return. In that case there is no entitlement to a right, so there cannot be an abuse of rights either. *Mutatis mutandis*, when the conditions for family reunification are fulfilled, there is a right to family reunification which cannot be considered to be abuse, even if national law was circumvented.[158]

When considering the difference between failing to fulfill the applicable conditions to retain a residence right and abuse of law, there is a difference between marriages of convenience and the Europe-route. When national law is circumvented, it depends on the circumstances of the case whether it can be classified as abuse or not. When a marriage of convenience is discovered, on the other hand, then Article 35 of Directive 2004/38 automatically labels this practice as an abuse.[159] Even then, however, the question about the distinction between non-applicability and abuse can be raised. Annulment of a marriage means that there was never a family relationship.[160] Since the rights that are granted by Directive 2004/38 are declaratory, this annulment implies that the conditions for family reunification were never fulfilled and the residence right

157 Ziegler, K.S. (2011). Abuse of Law in the Context of the Free Movement of Workers, cit., p. 296; Spaventa, E. (2011). Comments on Abuse of Law and the Free Movement of Workers. In: De La Feria and Vogenauer, eds., *Prohibition of Abuse of Law*, cit., pp. 315–320; Guild, E., Peers, S., and Tomkin, J. (2014). *The EU Citizenship Directive*, cit., p. 310.

158 Communication COM(2009) 313 final, cit., p. 15.

159 *Akrich*, cit.; *McCarthy*, cit.

160 Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*.

never existed in the first place. Consequently, the residence right would not be withdrawn on the basis of abuse of law, but because Directive 2004/38 would simply not be applicable. This reading of Directive 2004/38 is problematic, because it positions the withdrawal or termination of a residence right that results from the discovery of a marriage of convenience outside the scope of EU law altogether, which takes away the obligation to take account of the procedural safeguards which the directive provides. The mere existence of Article 35 of Directive 2004/38 opposes this view, because it provides that the termination or withdrawal of a residence right due to the discovery of a marriage of convenience should take place in accordance with the safeguards the directive provides for. It is thus suggested that the conclusion of a marriage of convenience and the pursuant – faulty – recognition of a residence right precludes the existence of this right ex tunc but still brings the situation within the scope of Directive 2004/38. The national measures to withdraw the residence right should, therefore, be taken in accordance with Art. 35 of the Directive.[161] This means that safeguards of proportionality should be applied,[162] which are not applicable if the withdrawal of a residence right would fall outside the scope of the Directive altogether.[163] In that case, the only safeguard that would still be available for the third-country national who lost his residence right is found in general international law, most notably in Art. 8 ECHR. As was mentioned earlier, the de facto protection of residence by Art. 8 ECHR is limited because its basic premise is very different than under EU law. Art. 8 ECHR departs from the

161 This reading of Directive 2004/38 corresponds with the rights that are laid down in Directive 2003/86, which is applicable to family members of third-country nationals legally residing in the EU. In accordance with Art. 17 of Directive 2003/86, residence rights can only be rejected, withdrawn or refused when due account is taken of the personal circumstances of the person concerned and a proportionality assessment is carried out. Directive 2004/38 should minimally offer the same protection as Directive 2003/86 (*Metock and Others*, cit., para. 69). Thus, withdrawal of a residence right that was conferred upon the third-country national through concluding a marriage of convenience, should be subject to the procedural safeguards in Directive 2004/38 as well.

162 Arts 30–31 of Directive 2004/38., cit.

163 A distinction is made between non-existence of a right and non-applicability of the Directive, and national authorities may struggle with the distinction. In Belgium, for instance, there is a divergence in responses to the discovery of a marriage of convenience. Some decisions place the withdrawal of residence rights derived from Directive 2004/38 outside the scope of the Directive and the implementing law (Vreemdelingenwet), while other decisions do apply the safeguards in the law that implements the Directive. See Kroeze, H.H.C. (2018). De Link Tussen Familierecht en Europees Migratierecht: De Route van de Vernietiging van een Schijnhuwelijk naar de Intrekking van Verblijfsrecht. *Tijdschrift voor Vreemdelingenrecht* 3, pp. 243–250.

authority of the Member States to decide on the entry of non-nationals into their territory.[164] Only when there are strong social and family ties in the Member State of residence non-admission or expulsion breaches the immigrant's right to family life.[165] To determine whether this is the case, a balance must be struck between the interest of the State and the interest of the individual. Art. 8 ECHR may provide a safety net for residence for those who fall outside the scope of EU law, but this does not compensate the loss of procedural rights that would be enjoyed on the basis of Directive 2004/38.[166]

A similar reasoning can be used for an EU citizen and his family member who want to rely on Directive 2004/38 in a return situation but fail to comply with the criterion of creating or strengthening family life in the host Member State before their return. If the criteria in O. and B. are considered to be a threshold for the applicability of EU law, noncompliance with those criteria results in non-applicability of EU law. Classifying reliance on the case-law of the Court in Surinder Singh and O. and B. when the condition to create or strengthen family life is not fulfilled as a form of abuse of law, on the other hand, does trigger the applicability and the procedural safeguards of Art. 35 of Directive 2004/38. In that case, the refusal of a residence right must be proportionate and must observe the procedural requirements in the Directive.[167] Hence, it seems in the interest of the involved families in cases of marriages of convenience and in return situations to apply the concept of abuse, rather than conclude that Directive 2004/38 is not applicable. Because if Directive 2004/38 is not applicable, the implication is that a situation is purely internal to the Member State and falls outside the scope of EU law. As was explained above, in that case only Art. 8 ECHR is left to provide protection and safeguards against expulsion or non-admission, but to qualify for residence under this provision is a high threshold. When a situation is qualified as abuse of rights, on the other hand, it comes within the scope of EU law and is, therefore, no longer a purely internal situation. As a result, safeguards derived from EU law are applicable before a residence right can be refused or withdrawn, for the better of the families involved.

164 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., para. 67; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cit., para. 39; *Jeunesse v. The Netherlands*, cit., para. 107.

165 E.g., *Sen v. the Netherlands*, cit.; *Tuquabo-Tekle et al v. the Netherlands*, cit.

166 E.g., *Jeunesse v. The Netherlands*, cit.; Thym, D. (2008). Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases, cit., p. 87 et seq.; Van Elsuwege, P. and Adam, S. (2017). EU Citizenship and the European Federal Challenge Through the Prism of Family Reunification, cit., pp. 443–467; Kroeze, H.H.C. (2019). The Substance of Rights, cit.

167 Arts 30–31 of Directive 2004/38, cit.

IX Personal Scope of Family Life

If the possibility to derive a residence right in a return situation is defined by the question whether family life was created or strengthened during the exercise of free movement rights abroad, the next question is which family members are eligible to have a family life with.[168] This question is particularly relevant, because Member States have different practices concerning which family members they entitle for family reunification, and with regard to the recognition of family relationships that originated in other (Member) States. Recently, a few cases provided new insights on this matter.

In Banger, the Court of Justice ruled on the question whether the possibility to retain a residence right in a return situation also applies to the partner with whom the Union citizen has a durable relationship, when the Member State of the Union citizen does not grant family reunification to the unmarried and unregistered partner.[169] The case at hand was about Mr. Rado, a UK national, who had resided in the Netherlands with his South-African partner, Mrs. Banger, and now wished to return to the UK with her. The Court considered that in principle, Directive 2004/38 does not require the Member States to admit the partner of an EU citizen with whom he enjoys a durable relationship. The Court's case-law on return situations, however, should be applied without any reservations.[170] Thus, even though the UK lacks a right to family reunification between EU citizens and the partner with whom they have a durable relationship, it is still obliged to recognize the validity of this relationship under EU law, for the purpose of deriving a residence right from EU law in a return situation.[171]

Coman was about the return of a Romanian national from Belgium to his home Member State, who wanted to be accompanied by his husband – a US

168 Another question that is relevant in the context of family reunification derived from exercising free movement rights in return situations and in general, concerns the applicability of EU law on citizens with multiple EU nationalities. If such an individual moves between two Member States of which he is a national, is he eligible for family reunification rights in both countries or in neither of them? And is it possible to rely on the Court's doctrine about return situations after having resided in a Member State of which the EU citizen is also a national? The current chapter does not elaborate on this issue, but David de Groot does discuss these questions in the contribution he added to this volume: Free Movement of Dual EU Citizens.

169 *Banger*, cit., para. 19. For an analysis on this case see Oosterom-Staples, H. (2018). Noot bij HvJ EU 27 juni 2018, zaak C-230/17 (Altiner en Ravn) en HvJ EU 12 juli 2018, zaak C-246/17 (Banger), cit.

170 *Banger*, cit., para. 24-34.

171 *Banger*, cit., para. 35.

citizen. Romania refused the application, because it does not recognize gay marriages, and therefore excluded the couple from the applicability of EU free movement law after Coman's return. The Romanian Constiutional Court referred the case to the Court of Justice to ask whether this practice was in accordance with EU law.[172] The Court of Justice reiterated the possibility to retain residence rights of an EU citizen's family member after the EU citizen has exercised his free movement rights and then returns to his Member State of origin. It then dealt with the question whether same-sex spouses are included within the personal scope of these rights, which are awarded under the conditions that are set by Directive 2004/38, which applies by analogy. In doing so, it observed that the term 'spouse' within the meaning of Directive 2004/38 is gender-netural and may therefore cover the same-sex spouse of the Union citizen concerned. This reading is furthermore supported by the fact that spouse is a communitarian concept, for the interpretation of which no reference is made to the Member State legislation. Therefore, Member States cannot rely on their national laws to refuse a residence right to the same-sex spouse of an EU citizen that is derived from EU law. It is therefore bound to recognize the marriages concluded in another Member State.[173] This obligation does not impose an obligation for the Member States to provide for the possibility of same-sex marriages in their national family law, which is a competence of each Member State. Nevertheless, the exercise of those competences is limited by the obligations that stem from EU law. Most notably, Member States should ensure freedom of movement for all EU citizens, and acknowledge the rights that are attached to exercising this freedom.[174]

Both cases oblige the Member State to acknowledge a residence right to family members of EU citizens, who they do not recognize as family members in their national law. In Banger, a residence right was awarded to the partner in a durable relationhip with the returning UK national who exercised his free movement rights, even though the UK does not grant this right to its own citizens or to EU citizens residing in the UK, and neither does EU law impose that obligation. Yet, rights that were acquired in another Member State should

172 *Coman*, cit., para. 9–12 and 17. For an analysis on this case see Tryfonidou, A. (2018). Free Movement of Same-sex Spouses Within the EU: The ECJ's Coman Judgment, cit.; Kroeze, H.H.C., and Safradin, B. (2019). Een Overwinning voor vrij Verkeersrechten van Regenboogfamilies in Europa: Het Langverwachte Coman Arrest, cit.; Kochenov, D., and Belavusau, U. (2019). Same-sex spouses in the EU after Coman: More free movement, but what about marriage? *EUI Department of Law Research Paper* 2019.

173 *Coman*, cit., para. 29–36.

174 *Coman*, cit., para 37–40.

be preserved, despite national policy choices that would indicate otherwise.[175] In the light of constitutional EU law this case-law of the Court is not surprising and seems to be connected to the principle of mutual recognition.[176] If a durable relationship is recognized in one Member State as eligible to enjoy a residence right, the other Member States must recognize the rights that are derived thereof, which is an affluent of the principles of effectiveness and loyal cooperation.[177] The same goes for the residence right of the same-sex spouse of an EU citizen who created or strengthened family life with that spouse in another Member State and then returns to his home Member State as in Coman. The case-law is understandable from a European constitutional perspective and fits the internal market logic of mutual recognition, but it does have a serious impact on the family law and private international law competences of the Member States.

Under international law and private international law, states have the competence to decide which family relationships they recognize. *Mutatis mutandis*, if a state does not recognize gay marriage, or it does not attach any legal consequences to a durable relationship between unmarried partners, it is within its discretion to allow or disallow access to its territory and to attach rights to these personal status or not. The discussed case-law reduces this competence by dictating that for the purpose of deriving rights form EU law, certain relationships must be recognized, regardless of the recognition of these relationships in the national law of the Member State. In Coman, Member States opposed this approach, and argued that Member States should be allowed to refuse a residence right to a family member that is not recognized as such under their national law, on the basis of objective public-interest considerations

175 It is asserted here that the obligation for the Member States to recognize rights that were acquired under EU law in another Member State should not only extend to citizens who return to their home Member State, but also to citizens who move between two Member States of which they are not a national. For them the same principle applies. Rights acquired on the basis of EU law through the exercise of free movement rights should be retained, also when they are brought with to another Member State of which the beneficiary is not a national.

176 Court of Justice, judgment of 20 February 1979, case 120/78, *Cassis de Dijon*, para. 14.

177 Article 4(3) TEU. The possiblity to preserve acquired rights is also interesting from the perspective of the international law doctrine of 'acquired rights', which provides that rights obtained on the basis of a Treaty cannot be taken away. See Sik, K. (1977). The Concept of Acquired Rights in International Law: A Survey. *Netherlands International Law Review* 24 (1–2), pp. 120–142; For the application in a Brexit context see Cambien, N. (2018). Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal. *European Papers* 3 (3), pp. 1333–1352. Cambien also explains that the application of the acquired rights doctrine to EU citizenship rights in practice is quite difficult.

or to preserve the national identity of a Member State that is protected by Article 4(2) TEU, but the Court of Justice rejected their arguments. It considered thereto that its decision in Coman does not oblige Member States to provide the institution of marriage between two persons of the same sex in its national law. It only requires the recognition of these marriages for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.[178]

Indeed, the Court's judgment is an affluent of long-standing constitutional principles, but the application thereof seems not only to perpetuate these principles. Through its case-law, the Court may in fact have created a new space in EU law. By defining which relationships should be recognized by the Member State, even if only for the purpose of maintaining rights that were acquired under EU law, a European family law may develop to define which relationships are eligible for rights derived from EU law.

Another argument for this thesis can be found in the case of SM. SM concerned an Algerian child which was placed under kafala with a French couple who resided in the UK. Kafala is an Islamic institution that resembles foster parentship, but it does not create legal descendence. The French couple applied for family reunification with the Algerian child under EU free movement law, but this was refused, because the UK does not recognize children placed under kafala as family member that qualify for family reunification.[179] The Court of Justice did agree that a child placed under kafala cannot be considered a 'direct descendant' within the meaning of Article 2(2c) of Directive 2004/38.[180] It can, however, be qualified as 'other family member' within the meaning of Article 3(2a) of Directive 2004/38, whose entrance into the host Member State of an EU citizen must be facilitated.[181] SM did not concern a return situation, but the approach of the Court is similar to its approach in the two cases that were discussed above. The Court decided whether and under which conditions a family relationship qualifies for family reunification under EU free movement law, regardless of whether national law recognizes that relationship or not. Furthermore, if family reunification with the child who is placed under kafala is granted in the UK, the reading of Banger and Coman

178 *Coman*, cit., para. 42–46.

179 Court of Justice, judgment of 26 March 2019, case C-129/18, *SM*, para. 23–30. For an analysis on this case see Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference. *European Papers* 4(1), pp. 389–393; Den Haese, S., and Kroeze, H.H.C. (2019). The Emergence of a European Family Law? The 'Right' of a Child Placed under *Kafala* Care to Reside within the EU with his Guardian(s). *Tijdschrift Internationaal Privaatrecht*, forthcoming.

180 *SM*, cit., para. 49–56.

181 *SM*, cit., para. 55–59.

implies that when the couple returns to France, France is held to recognize this relationship as well, regardless of their national recognition of children placed under kafala under private international law.

Still, the qualification of family relationships that are eligible for family reunification under EU free movement law is not arbitrary. The aforegoing chapters elaborated upon the criterion of having created or strengthened family life in order to retain a residence right that was obtained in the host Member State upon return to the home Member State of the EU citizen. It was observed that the use of this criterion is coherent with the objectives of free movement law, which provides for family reunification rights to facilitate movement of EU citizens between Member States. It follows from the more recent case-law that the scope of family members who could potentially benefit from family reunification under EU law in a return situation and in general, is also connected to the existence of family life. Whereas in O. and B., Altiner and Ravn, and Banger, the Court mentioned the existence of family life *in abstracto* as a criterion for family members of EU citizens to qualify for a residence right in a return situation, in Coman and SM, the Court made reference to the ECtHR. It reiterated that the free movement provisions should be interpreted in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, which protect family life and the interest of the child. Pursuant to Article 52(3) of the Charter of Fundamental Rights of the European Union, the rights in the Charter that correspond to rights in the European Convention of Human Rights should be interpreted accordingly and minimally offer the same protection. Furthermore, the Court reasons, the protection of Article 8 ECHR also extends to same-sex relationships and children placed under kafala. Thus, if Article 7 Charter should be interpreted accordingly, then same-sex relationships and children placed under kafala should enjoy protection under EU law as well.[182] The only difference between the ECHR and the EU regime, is that the existence of family life under the ECHR does not create an entitlement to family reunification, whereas the recent case-law of the Court of Justice indicates that EU law does create such an entitlement.[183]

182 For same-sex relationships: *Coman*, cit., para. 48–51; European Court of Human Rights, judgment of 7 November 2013, no. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, para. 73; judgment of 14 December 2017, no. 26431/12, 26742/12, 44057/12, and 60088/12, *Orlandi and Others v. Italy*, para. 143. For kafala: *SM*, cit., para. 66; European Court of Human Rights, judgment of 4 October 2012, no. 43631/09, *Harroudj v. France*, para. 40–41; judgment of 16 December 2014, no. 52265/10, *Chbihi Loudoudi and Others v. Belgium*, para. 88–89.

183 European Court of Human Rights, judgment of 28 May 1985, nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* para. 68; judgment of 31

If Coman and SM indeed predict an understanding of EU law in which the existence of family life within the meaning of Article 8 ECHR is sufficient to become eligible for family reunification rights when free movement rights are relied upon, its potential scope is not necessarily limited to blood relationships. It is perceivable that family life exists with a non-family member, for instance when two friends live together and run a household together and support each other in the same way a family would. If the development in Coman and SM is drawn further upon, such a situation may qualify for family reunification under EU law as well, including after the exercise of free movement rights upon return to the home Member State of the EU citizen.[184] This approach 'relies, for these purposes, on a flexible, pragmatic idea of family that leaves potential room to several models of cohabitation and reciprocal responsibility, and to a variety of underlying bonds, from the biological, to the legal, to the factual and affective.'[185] Time will tell if EU law indeed develops in that direction or not.[186]

X Concluding Remarks

The beginning of this contribution problematized the tension between the principle of equality and the division of competences in the EU. Equality is an ideal to strive for that is anchored in the EU Treaties but is contrasted with the preservation of Member States' sovereignty. This tension is particularly prevalent in family reunification. The EU is competent to regulate family reunification for EU citizens who make use of their free movement rights, while those

January 2006, no. 50435/99, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, para. 39; judgment of 3 October 2014, no. 12738/10, *Jeunesse v. The Netherlands*, para. 107; Kroeze, H.H.C. (2019). The Substance of Rights, cit., p. 253 et seq.

184 Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference, cit., p. 390–391; Kroeze, H.H.C. (2019). De zin van het gezinsleven: gezinshereniging op grond van een "duurzame relatie" en de implicaties van rechtsmisbruik. *Tijdschrift voor Vreemdelingenrecht* 3, pp. 258–266.

185 Strumia, F. (2019). The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference, cit., p. 392.

186 If so, it would mirror the development of family reunification rights derived from Article 20 TFEU. Family reunification on the basis of this provision is granted on the basis of dependency between an EU citizen and his family member, but case-law shows that this does not need to be a family member that is bloodrelated. In theory, all relationships of dependency are potentially eligible for family reunification on these grounds. See Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O.S. and L.*; judgment of 8 May 2018, case C-82/16, *K.A.*, para. 65; Kroeze, H.H.C. (2019). The Substance of Rights, cit.

who do not use their free movement rights fall under the competence of the Member States. Member States often impose stricter requirements for family reunification than the EU, whereby they reversely discriminate their own nationals, insofar as they did not use free movement rights. The existence of reverse discrimination is counter intuitive and if the EU and its Member States do not take up the responsibility to remedy this inequality it may seriously undermine the EU's legitimacy. In the meantime, however, this contribution explored another partial remedy to reverse discrimination within the constitutional limits of the EU.

In its case-law, the Court of Justice decided that residence rights for a family member of an EU citizen, who made use of free movement rights, can be retained after return to the home Member State of the EU citizen, provided that the exercise of those rights was effective and genuine. This means that an EU citizen can circumvent national family reunification law by temporarily moving to another Member State and then return with residence rights for his family member. This possibility empowers EU citizens who face reverse discrimination to escape from it. It remains a liability that only EU citizens who are already empowered can benefit from this route which requires financial investment and knowledgeability, but it is a partial solution to reverse discrimination which stays within the constitutional limits of EU law. Member States may want to act against circumvention of their national laws. Therefore, they have the possibility to classify circumvention of national law as an abuse of rights, which legitimizes the refusal or withdrawal of residence rights. The downside thereof is that reliance on abuse of law undermines legal certainty and the certainty for families about whether or not they are able to live with their loved ones. For these reasons, the definition of the scope of abuse of law is very important. A broad scope of abuse of law gives way to frequent intervention by the Member States to protect themselves from circumvention of their national law. A narrow scope of abuse of law limits the scope of application by the Member States and offers more legal certainty and protection of citizens' rights. In the case-law of the Court, a movement can be observed, from a broad essential purpose construction of abuse of law, towards a narrower sole purpose construction of abuse of law. The shift in the general abuse of law doctrine is especially strong in the field of family reunification, where reliance on abuse of law is almost fully rejected and reduced to a merely theoretical legal principle. The crucial criterion for a legitimate use of EU law that was formulated in cases such as Akrich, O. and B., and Coman is that use of EU rights is effective and genuine. More concretely, to retain residence rights upon return to the home Member State of the EU citizen, residence in the host Member State must be such as to have

created or strengthened family life. Following the Court's decision in O. and B. and Altiner and Ravn, a new interpretation of this criterion was suggested. It was proposed to adopt a presumption of having created or strengthened family life when residence in the host Member State had a duration of more than three months in accordance with Art. 7 of Directive 2004/38, rather than making the three months a fixed condition to retain a residence right. Periods of residence less than three months, in accordance with Art. 7 of Directive 2004/38, would then not automatically lead to the refusal of a residence right in the home Member State upon return but require additional evidence of having created or strengthened family life.

The focus on genuine use of EU law and the impact of the movement on family life is quite understandable. Considering the importance the Court attaches to the principle of effectiveness in EU law, it is unsurprising that it does not easily allow for derogation by the Member States through invoking abuse of law. In addition, it is in line with the increasing role of fundamental rights protection, provided by the ECHR and by the Charter, in the EU legal order that protection of the family is prioritized over protecting the enforcement of national migration law. That may also be the reason why the Court, first, shifted towards the sole purpose doctrine in the context of free movement rights, several years before it did so in other fields of EU law.

Although the protection of the family by EU law is commended, constructing the scope of abuse of law too narrowly could also backfire. The decisions of the Court in its most recent case-law could suggest that there is no more place for abuse of law, and noncompliance with the conditions to retain residence rights upon return to the home Member State of the EU citizen simply results in non-applicability of EU law. That interpretation would, however, reduce a return situation in which the requirement of genuine residence is not fulfilled to a purely internal situation, without any protection provided by EU law. In that case, protection by the ECHR might offer solace, but this protection is less extensive than the protection by EU law. Classifying non-compliance with the conditions for reliance on EU law in a return situation as abuse of rights, on the other hand, brings the situation within the scope of EU law and requires that procedural safeguards provided by the directive are observed. Thus, arguably, a narrow construction of abuse of law benefits EU citizens and their family members, because it provides certainty about their rights and future, but when the requirements for a right are not fulfilled they are better off when it is qualified as abuse than when EU law is considered not to be applicable. This is also a better solution in the light of of reconciling the principle of equality and the principle of the division of competences in EU law. To protect the competence of the Member States, more cases could be qualified as abuse, but once people

fall within the scope of EU law the safeguards against deprivation of the rights they obtained are equal for everyone .

The final part of this contribution concerned the definition of family members that are eligible for family reunification under EU free movement law and in return situations. Traditionally these are the family members defined in Article 2(2) of Directive 2004/38, but differentiation in definitions among the Member States still causes uncertainty about which family members of EU citizens may derive a residence right from EU law. It was shown that recent case-law could remedy this uncertainty through the development of a type of European family law, which defines which family members should qualify for family reunification on the basis of Article 2(2) or 3(2) of Directive 2004/38. Although Member States remain competent in principle to define the categories of family members that are mentioned in Article 2(2) of Directive 2004/38, they are also in principle obliged to recognize derived residence rights that are obtained in other Member States in accordance with the law and definition of the family of those Member States. This was the case in Banger and Coman, in which a residence right for the partner with whom the EU citizen maintained a durable relationship, and a residence right for the partner of the same sex as the EU citizen had to be recognized, even though the Member States in those cases did not themselves grant these rights to those categories of family members. The same happened in the case of SM, in which the Court considered that a child placed under kafala should be eligible for family reunification with his legal guardians under Article 3(2) of Directive 2004/38, regardless of the national recognition of kafala guardianship. This development impacts the competence of the Member State in family law and private international law, but it does provide more legal certainty and the Court is wary to limit the impact of its decisions to the EU sphere.

The main purpose of this contribution was to further understand the conditions under which EU law can be legally used for family reunification, even if national immigration law is circumvented. It was demonstrated that the creation, strengthening and continuation of family life is central to this exercise, which is welcomed from a perspective of legal certainty, and from a human rights angle.